Supreme Court, U.S.
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No. 99-

IN THE
Supreme Court of the United States

MARATHON OIL COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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August 11, 1999

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QUESTION PRESENTED

Whether the United States, after having accepted consideration from a government contractor, is required to return that consideration (*i.e.*, pay restitution) when subsequent government action bars the United States from performing its contractual obligations?

PARTIES TO PROCEEDING BELOW AND RULE 29.6 STATEMENT

In addition to petitioner, Mobil Oil Exploration & Producing Southeast, Inc., was a plaintiff-appellee below. The following parties were plaintiffs, but not appellees, below:

Conoco, Inc.,
Amerada Hess Corporation,
Chevron USA, Inc.,
Murphy Exploration & Production Co.,
Murphy Oil USA, Inc.,
OXY USA, Inc.,
Pennzoil Exploration & Production Co., and
Shell Offshore, Inc.

Pursuant to Rule 29.6, Marathon Oil Company states that its parent company is USX Corporation. The following are subsidiaries of Marathon Oil Company that are not wholly owned:

Arctic LNG Transportation Company,
Colonial Pipeline Company,
Eagle Sun Company Limited,
Explorer Pipeline Company,
Kenai LNG Corporation,
Marathon Ashland Petroleum LLC,
Odyssey Pipeline L.L.C.,
Oil Insurance Limited,
Polar LNG Shipping Corporation,
Poseidon Oil Pipeline Company, L.L.C.,
West Shore Pipe Line Company, and
Wolverine Pipe Line Company.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Marathon Oil Company ("Marathon Oil") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The superseding opinion of the Court of Federal Claims (App. 45a-99a) granting petitioner's motion for partial summary judgment as to liability is reported at 35 Fed. Cl. 309. The judgment of the Court of Federal Claims in favor of petitioner (App. 44a) is unreported. The original opinion of the United States Court of Appeals for the Federal Circuit (App. 25a-43a) reversing the judgment of the Court of Federal Claims was entered on October 15, 1998, and is reported at 158 F.3d 1253.

The court of appeals granted panel rehearing and entered a revised order and opinion (App. 1a-24a) on May 13, 1999, which is reported at 177 F.3d 1331.

JURISDICTION

The court of appeals entered its original decision on October 15, 1998. On November 25, 1998, petitioner timely filed a petition for rehearing and suggestion for rehearing *en banc*. The court granted panel rehearing and entered a revised judgment on May 13, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved in this case are (1) the Outer Continental Shelf Lands Act of 1953, ch. 345, 67 Stat. 462 (codified as amended at 43 U.S.C. § 1331 *et seq.*), (2) the Outer Banks Protection Act, Pub. L. No. 101-380, § 6003, 104 Stat. 484, 555-58 (1990), and (3) the Coastal Zone Management Act, 16 U.S.C. § 1456, which are reproduced in pertinent part in the appendix at 100a-158a, 159a-165a, and 166a-173a, respectively.

STATEMENT OF THE CASE

Judge Newman's dissent from the Federal Circuit's decision on rehearing summarizes the question presented in this case.

> This is a contract case. The Court of Federal Claims, determining that the contract between [petitioner] Marathon [Oil Company] and the United States was made impossible of performance by governmental action, held that Marathon [and its partner] [are] entitled to recover what [they] paid the government for the now-barred contract rights, $156,000,000 paid up-front.
>
> The legal issue is not complex. When one party to a contract prevents the other party from achieving the benefit for which it paid, the party who prevents the performance can not retain the consideration it accepted for the performance. . . . Marathon does not challenge the government's change of policy [that barred it from exercising its contract rights]; nor does Marathon seek damages, or specific performance, or other interesting things. Marathon just wants its money back.
>
> The Court of Federal Claims, applying simple contract principles, ordered the government to return this payment. My colleagues now authorize the government to keep it. That is not the law, and it is not responsible government dealing.

App. 19a-20a (footnote omitted). Judge Newman's analysis is correct and provides a complete rationale for further review by this Court.

1. *Outer Continental Shelf Lands Leasing Scheme*

The Outer Continental Shelf Lands Act of 1953 ("OCSLA"), ch. 345, 67 Stat. 462 (codified as amended at 43 U.S.C. § 1331 *et seq.*), establishes federal jurisdiction over the seabed and subsoil of the continental shelf lying more than three miles from the coast of the United States ("OCS lands"). See 43 U.S.C. § 1333(a). The OCSLA further authorizes the Secretary of the Interior ("the Secretary") to sell leases to private parties to explore for and develop oil and gas deposits on those lands. See *id.* § 1337. Those leases "entitle the lessee to explore, develop, and produce the oil and gas contained within the lease area," subject only to the lessee's due diligence and compliance with the OCSLA and regulations promulgated thereunder. *Id.* § 1337(b)(4).

Under the OCSLA, leases for tracts of OCS land are sold by the Department of the Interior ("DOI") through

a competitive bidding process. The winning bidders in this process are required to pay large, up-front, cash "bonuses" as well as annual lease payments for their leases and—if production is ever achieved—royalties on any oil or gas produced. See *Watt* v. *Energy Action Educ. Found.*, 454 U.S. 151 (1981) (upholding DOI's up-front, cash "bonus" system). Since OCSLA's enactment in 1953, over 19,000 OCS leases have been sold and successful bidders have paid more than $60.7 billion in "bonuses" to the United States for the right to explore their tracts and develop any oil and gas deposits they find. See Minerals Management Serv., U.S. Dep't of the Interior, *Mineral Revenues 1998*, at 51 (prelim. ed. 1999).

When a lease tract is not adjacent to known deposits of oil or gas, the first step in exploiting an OCS lease is the preparation and submission to the Secretary of a plan of exploration ("POE"). See 43 U.S.C. § 1340(b), (c)(1). A POE must set forth, in detail, a schedule of planned exploration activities, a description of the equipment to be used, the location of each exploratory well to be drilled, and other pertinent information. See *id.* § 1340 (c)(3). Following submission of a POE, the Secretary is required to determine whether the POE is "consistent" with the OCSLA and the regulations promulgated thereunder. *Id.* § 1340(c)(1). The Secretary may require modifications of a POE to achieve such "consistency," and upon determining that the POE is "consistent" with the OCSLA, "*shall*" approve the POE. *Id.* (emphasis added).

The OCSLA places a strict time limit for action by the Secretary with respect to a POE that is "consistent" with the OCSLA. Under the OCSLA's express terms, "[t]he Secretary *shall* approve such plan, as submitted or modified, within *thirty days* of its submission," *id.* (emphasis added), unless (A) the proposed exploratory activities would probably cause serious harm or damage to, *inter alia*, life (including fish and other aquatic life) or the environment *and* (B) those activities "cannot be modified to avoid" such harm or damage, *id.* (emphasis added) (incorporating by reference *id.* § 1334(a)(2)(A)(i)). If the Secretary disapproves a POE that is "consistent" with the OCSLA under the foregoing provision, he may cancel the lease, entitling the lessee to compensation. *Id.* § 1340 (c)(1).

After a POE is approved, the next step in the process is for the lessee to obtain the necessary permits to begin exploratory drilling. *Id.* § 1337(d). In order to obtain a federal drilling permit, a lessee whose activities will affect land or water uses in the coastal zone of a State with a federally approved coastal zone management program must, under the Coastal Zone Management Act, 16 U.S.C. § 1456(c)(3)(B) ("CZMA"), certify that its proposed activities comply with the State's program. Under the OCSLA, the Secretary may not issue a drilling permit unless the State concurs, *id.* § 1456(c)(3)(B)(i), or is presumed to concur with that certification, *id.* § 1456(c) (3)(B)(ii), or the State's objection is overridden by the Secretary of Commerce, *id.* § 1456(c)(3)(B)(iii). See 43 U.S.C. § 1340(c)(2).

A lessee's failure to obtain a State's CZMA concurrence is *not* a ground under the OCSLA for withholding approval of an otherwise approvable POE. Although the OCSLA expressly prohibits the Secretary from granting a drilling license or permitting exploratory activity without a State's CZMA concurrence (or a federal override of its objection), it does not restrain him from taking the first step—approving a POE that complies with the OCSLA—

even in the face of a State's CZMA objection. *Id.* Indeed, during the relevant period, the DOI's own regulations made clear that a POE complying with the OCSLA was approvable notwithstanding a State's CZMA objection, but that applications for drilling permits needed to commence exploratory activities could not be approved without the State's CZMA concurrence. Compare 30 C.F.R. § 250.33 (i) (1993) with *id.* § 250.33(p).

If a lessee's initial exploration of its tract proves successful, it may (and often will) pursue additional exploratory activities by preparing and submitting additional POEs. For example, when a first exploratory well finds oil or gas, the next step is often to drill additional wells to locate the boundaries of the deposit. Finally, in order to extract any oil or gas found, the lessee must prepare and submit a development and production plan ("POD"). See 43 U.S.C. § 1351(a)(1).

2. *Petitioner's Leases*

In August 1981, petitioner purchased one-third undivided lease interests (along with Mobil Oil Exploration and Producing Southeast, Inc. ("Mobil") and Amerada Hess Corporation) in five OCS tracts off the coast of North Carolina. In exchange for the right to "explore, develop and produce the oil and gas contained within" these tracts, 43 U.S.C. § 1337(b)(4), the lessees (including petitioner) *each* paid more than $78 million to the United States in up-front, cash "bonuses." App. 7a. The lessees each subsequently paid a total of more than $264,000 in annual lease payments to the United States during the leases' ten-year primary term. *Id.*

Each of the lease agreements between petitioner and the United States was a non-negotiable, standard-form con-

tract prepared by the DOI. See App. 174a-192a (sample OCS lease). Under the leases, petitioner acquired "the exclusive right and privilege to drill for, develop, and produce oil and gas resources, except helium gas" on its OCS tracts. *Id.* at 175a (§ 2).[1] As the Court of Federal Claims found, the United States obligated itself to "timely and fairly consider—not necessarily approve, but at least consider—exploration plans properly submitted." *Id.* at 76a. "Otherwise," the court concluded, "the bargain between the [United States] and [petitioner] would be illusory and would permit [the government's] unilateral forfeiture of [petitioner's] lease bonuses with impunity." *Id.* at 57a; see also *id.* at 76a.

In 1989, petitioner, the co-lessees of its OCS tracts, and owners of other adjacent OCS leases organized their tracts into a single exploration unit (the "Manteo Unit") and proposed to drill a single exploratory well approximately 45 miles east of Cape Hateras.[2] After the State of North Carolina raised initial environmental objections to the plan, Mobil (the operator of the Manteo Unit) entered into a memorandum of understanding with the DOI and the State on July 14, 1989. In this memorandum, Mobil agreed to produce a draft POE for DOI's and the State's review and to delay submitting a final POE until after DOI had completed a special environmental report assessing the environmental impacts of the proposed exploration of the Manteo Unit. App. 7a.

---

[1] The lease also reiterated the pre-existing requirement of the OCSLA that, in exploring and developing its OCS tracts, "shall comply with all regulations and orders relating to exploration, development, and production." App. 178a (§ 10).

[2] Four of petitioner's five OCS tracts were included in the Manteo Unit. The fifth—Currituck Sound Block No. 777—was not.

On June 1, 1990, the DOI issued a three-volume, 2000-page special environmental report. Based on this report, which one DOI official agreed was "the most extensive and intensive environmental examination that has ever been afforded an exploration well in the OCS program," J.A. 949-50, the DOI determined that the proposed exploration of the Manteo Unit would not result in any significant environmental impacts—either offshore or to the North Carolina coastal zone—and that the Manteo Unit's POE was consistent with the OCSLA and "approvable in all respects." App. 194a.

3. *Outer Banks Protection Act*

On August 18, 1990—before the Manteo Unit's final POE was submitted to the Secretary—the United States enacted the Outer Banks Protection Act ("OBPA") as part of the comprehensive Oil Pollution Act of 1990. See Pub. L. No. 101-380, § 6003, 104 Stat. 484, 555-58 (1990). This Act—without amending the OCSLA—expressly prohibited the United States from fulfilling its contractual obligations under petitioner's North Carolina OCS leases. By its terms, the OBPA imposed an open-ended "moratorium." App. 7a, on the approval of any exploration or development of North Carolina OCS lands by prohibiting the Secretary from:

> (A) conduct[ing] a lease sale;
>
> (B) issu[ing] any new leases;
>
> (C) approv[ing] any exploration plan;
>
> (D) approv[ing] any development and production plan;
>
> (E) approv[ing] any application for permit to drill; or
>
> (F) permit[ing] any drilling,

> for oil or gas under the Outer Continental Shelf Land Act on any lands of the Outer Continental Shelf offshore North Carolina.

OBPA § 6003(c)(1). This moratorium extended for at least 13 months, until October 1, 1991, and thereafter until the forty-fifth day of continuous congressional session after the Secretary submitted a written report to Congress certifying that the available information was sufficient to enable him to carry out his responsibilities under the OCSLA. *Id.* § 6003(c)(3)(A). The OBPA further mandated that the Secretary's report could be made only after he had considered the findings and recommendations of an Environmental Sciences Review Panel ("Review Panel"), which the OBPA created. *Id.* § 6003(c)(3)(A)(ii).

The OBPA's purpose is apparent from its history. In 1988 and 1989, Congress enacted similar "moratoria" by prohibiting the DOI from expending any funds to approve any exploration of OCS tracts offshore of both Florida and Alaska. See Pub. L. 100-446, § 110, 102 Stat. 1774, 1801 (1988) (Florida); Pub. L. 101-121, § 111, 103 Stat. 701, 720 (1989) (North Aleutian Basin). In June 1990, in response to environmental concerns raised by several States, President Bush instructed the DOI to cancel planned auctions of OCS leases offshore of California and Florida, to "[b]egin cancellation of *existing* leases off Florida," and to explore a "joint federal-state buy-back" of the Florida OCS leases. J.A. 988-89.

The State of North Carolina, and members of its congressional delegation, strenuously protested the omission of OCS tracts off its coast from these bans on exploration. In July 1990, Representative Jones of North Carolina introduced what would become the OBPA as an

amendment to the Oil Pollution Act of 1990. Representative Jones candidly explained the purpose of the OBPA: "[I]n his offshore moratoria proposal, the President has forgotten about North Carolina. Well, I have not." 136 Cong. Rec. 22,275 (1990).[3]

4. ***Application Of The OBPA***

On August 20, 1990—two days after the enactment of the OBPA—Mobil, on behalf of the Manteo Unit, submitted its final POE to drill a single exploratory well on the North Carolina OCS lands leased by the Unit. More than a month later, on September 28, 1990, DOI found that the Manteo Unit's POE complied with all DOI regulations and would have no significant impact on the environment. The DOI reported to the Governor of North Carolina as follows:

> The [Manteo Unit] Plan, together with its supporting information, is deemed to be approvable in all respects. The Outer Banks Protection Act (OBPA) of 1990, however, prohibits the approval of any Exploration Plan at this time. Under Section 11(c) of the Outer Continental Shelf Lands Act [43 U.S.C. § 1337(c)], we are required to approve an Exploration Plan unless it is inconsistent with applicable law or because it would result in serious harm to the environment. Because we have found that [the Manteo Unit's] Plan fully complies with the law and will have only negligible effect on the environment,

[3] Representative Rose of North Carolina expressed similar views:

> Governor Martin [of North Carolina] . . . was horrified when the President stopped offshore drilling off the coast of . . . Florida and left North Carolina out. And so he . . . wrote to Mr. Jones, and Mr. Jones did exactly what [Governor Martin] asked him to do, he put [the OBPA] in the legislation.

136 Cong. Rec. 22,277 (1990).

> we are not authorized to disapprove the Plan or require its modification as you suggest.
>
> However, because we are currently prohibited from approving it, the Plan will remain on file until the requirements of the OBPA are met. Our determinations concerning this Plan will be re-evaluated at that time.

App. 194a. Thus, although the DOI found the Manteo Unit's POE was "approvable in all respects," the Secretary nonetheless withheld his approval in order to comply with the OBPA and suspended petitioner's OCS leases—including the one that was not part of the Manteo Unit—as of August 18, 1990, the OBPA's effective date.[4]

Significantly, the OBPA's ban did not extend only to the specific exploratory activities proposed in the Manteo Unit's pending POE. By its terms, the OBPA prohibited the Secretary from approving *any* POE, permitting *any* drilling, or approving *any* POD for any North Carolina OCS tract, even if a lessee's application complied in every respect with the OCSLA and was *supported* (rather than opposed) by the State. See OBPA § 6003(c)(1). In short, as the Court of Federal Claims found, see App. 75a, the OBPA foreclosed petitioner from pursuing any of the rights it had purchased from the United States to explore and develop its North Carolina OCS tracts.

On November 19, 1990—even though the DOI had concluded two months earlier that the Manteo Unit's

[4] DOI lifted this suspension on June 8, 1992, after the Secretary certified that he had sufficient information to perform his responsibilities under the OCSLA with respect to the Manteo Unit's POE, *see infra* at 12. At Mobil's request, the suspension was reinstated on October 5, 1992, and remained in effect until November 9, 1994, after two of the additional studies recommended by the Review Panel were completed and the Secretary of Commerce had denied the Manteo Unit's appeals of North Carolina's CZMA objections, *see infra* at 12 & n.5.

planned exploratory activities complied in all respects with the OCSLA and would not have any significant impact on the environment—the State of North Carolina objected to the Manteo Unit's certification that its POE complied with the CZMA. App. 8a. Echoing the OBPA's findings, North Carolina's objection was based principally on its assertion that the available information was insufficient to assess the impact on the North Carolina coastal zone. The Manteo Unit promptly appealed the State's CZMA objection to its POE to the Secretary of Commerce. See *infra* at 12 n.5.

In January 1992—almost a year after the deadline set by the OBPA—the Review Panel established by the OBPA belatedly submitted its report to the Secretary. After reviewing this report, the Secretary certified to Congress on April 2, 1992, that "sufficient information presently exists to allow me to exercise my responsibilities under the OCSLA . . . and consider approval of the exploration activities currently proposed to take place offshore North Carolina (i.e., the first Manteo exploratory well)." App. 202a. Nevertheless, the Secretary refused to approve the Manteo Unit's pending POE or permit the drilling of the single proposed exploratory well until the completion of two studies that had been recommended by the Review Panel. *Id.* Although these studies were completed in July 1994, the Secretary ultimately never approved—or disapproved—the Manteo Unit's POE.[5]

As the government conceded below, by its express terms, the OBPA completely barred all activities required for petitioner and its partners to exploit their North Carolina OCS tracts from its enactment in 1990 until its

[5] On September 2, 1994, the Secretary of Commerce declined to override North Carolina's CZMA objections. The Secretary of Commerce's decision was based in large part on the OBPA and the recommendations of the Review Panel it had created.

repeal in 1996, see Pub. L. No. 104-134, § 109, 110 Stat. 1321, 1321-177 (1996)[6]—almost four years after petitioner filed this suit. The only OBPA certification the Secretary ever made to Congress extended *only* to the single exploratory well proposed in the Manteo Unit's POE, which the Secretary nonetheless declined to approve. In fact, the Secretary specifically advised Congress in April 1992 that further studies would be required for him to make the OBPA certification for additional (or different) wells, POEs, and PODs, and that those studies "w[ould] not begin in earnest prior to reviewing the initial exploration drilling." App. 202a. Accordingly, even if the Manteo Unit's POE had been approved and its single exploratory well allowed to proceed, the OBPA continued—even after the Secretary's April 1992 certification—as a bar to all (i) subsequent exploratory plans (such as those four additional wells to determine the boundaries of any deposits found by the first well), (ii) different exploratory activities, and (iii) the ultimate production and development of any oil or gas deposits found. See *id.* at 75a.

5. *Proceedings Below*

In October 1992, Marathon Oil, along with the other owners of leases for North Carolina OCS tracts, joined a lawsuit filed by Conoco, Inc. against the United States for breach of the leases it had entered into for, *inter alia*, OCS tracts off the coast of North Carolina. In that suit, petitioner contended that the enactment and enforcement of the OBPA had materially breached its OCS leases by preventing the Secretary from performing his contractual duties. As the Court of Federal Claims explained, peti-

[6] As indicated by its legislative history, "[t]he repeal . . . [wa]s not intended to excuse the United States from . . . liabilit[y], if any, it has incurred to date nor otherwise affect pending litigation." 141 Cong. Rec. H9443 (daily ed. Sept. 21, 1995).

tioner "d[id] not claim that [the government's] failure to approve [the Manteo Unit's] POEs and grant the necessary permits breached [its] lease contracts, but only that [the government's] failure at least to fairly consider their plans was a material breach." App. 57a. Accordingly, petitioner sought restitution of the up-front, cash "bonuses" it paid, as well as its annual lease payments.

On April 1, 1996, the Court of Federal Claims granted partial summary judgment for petitioner as to liability, holding that the United States' "failure [to carry out its contractual obligations], under the restrictions adopted pursuant to the OBPA, was a material breach of the leases." App. 84a. The court began by rejecting the United States' principal claim that the text of the leases—which made them subject to the OCSLA, " 'all regulations . . . in existence upon the Effective Date of th[ese] lease[s]; . . . and *all other applicable statutes and regulations*,' " *id.* at 52a, 75a (emphasis added) (§ 1)—made petitioner's contractual rights expressly subject to all future statutes enacted by the United States, including one, such as the OBPA, which was both unforeseeable and effectively extinguished those rights. See *id.* at 68a-69a. As the court concluded, "the lease contracts here at issue cannot be construed to allow for such drastic unilateral interference by the government, through passage of highly restrictive legislation, the OBPA, with the lessees' bargained for rights of exploration." *Id.* at 67a.

The court next held that the United States' enactment and implementation of the OBPA constituted a "total breach" of its lease contract with petitioner.

> [U]nder the lease agreements, defendant was contractually obligated to consider facially compliant POEs promptly and fairly. Any contrary interpretation would render the bargain illusory and subject to unilateral forfeiture. Clearly, the OBPA imposed

> severe, burdensome, new conditions upon the DOI's obligation under OCSLA to approve POEs offshore North Carolina, which were not contemplated by the parties when the leases were executed. Therefore, the court also finds that compliance with the OBPA compelled governmental breach by non-performance accompanied by an anticipatory repudiation thereby giving rise to "total breach."

App. 76a.[7] On July 24, 1997, the Court of Federal Claims awarded Marathon Oil restitution of the up-front, cash "bonuses" it had paid for its North Carolina OCS leases and entered judgment in its favor in the amount of $78,242,368.59. *Id.* at 44a.

On October 15, 1998, a divided panel of the Federal Circuit reversed. Judge Plager, joined by Judge Schall, wrote the majority opinion. Judge Newman dissented. Petitioner timely filed a petition for rehearing and suggestion for rehearing *en banc*. Thereafter, five members of the court of appeals, including Judge Schall, recused themselves, presumably as a result of Mobil's merger with Exxon Corporation, which was announced in December 1998. Judge Schall was replaced by Judge Rader. On May 13, 1999, without hearing re-argument, the newly-constituted panel issued a revised opinion again reversing the judgment of the Court of Federal Claims, again by a divided vote.

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[7] Relying on *Winstar Corp.* v. *United States*, 64 F.3d 1531 (Fed. Cir. 1995) (*en banc*), *aff'd*, 518 U.S. 839 (1996), the court also rejected the government's arguments that it was immune from liability under the sovereign acts and unmistakability doctrines, finding that the OBPA "was not an act of public, general applicability," App. 96a, but was instead "narrowly tailored to target the specific contracts and sought to abate the accompanying rights here at issue," *id.* at 91a. The government abandoned these arguments on appeal following this Court's decision in *United States* v. *Winstar Corp.*, 518 U.S. 839 (1996).

The majority opinion, again authored by Judge Plager, first agreed with the Court of Federal Claims that petitioner's OCS leases were not, by their terms, subject to modification by subsequent legislation such as the OBPA. App. 12a. The court of appeals rejected the lower court's conclusion that the OBPA had compelled the government to breach the leases, however, because, in the majority's view, the OBPA was not the "real reason" for DOI's failure to approve the Manteo Unit's POE.

> Whatever restraints on secretarial action were imposed by the OBPA essentially had no effect upon these OCS leases because exploration could not proceed without North Carolina's concurrence in the POE's CZMA consistency certification or the override provided by law. . . . [E]ven if the Secretary had felt constrained in acting on the application by the provisions of the OBPA, the law is clear that had he been free to act, he could not have issued any permits for exploration so long as North Carolina's objections remained in force.

Id. at 14a-15a (citation omitted). The court then sidestepped petitioner's argument that the State's CZMA objections were not independent of the OBPA and could have been overridden by the Secretary of Commerce, by characterizing petitioner's argument as a challenge to the Secretary's failure to act, an issue "not before us on appeal." *Id.* at 16a.

Finally, the majority turned to petitioner's claims for restitution. Although the majority acknowledged that petitioner's rights to explore and develop its OCS tracts had been frustrated, the court denied petitioner's restitution of the up-front "bonuses" it had paid on the ground that there was

> no principaled distinction between a lessee whose hopes for large rewards from such a lease are frustrated by a failure to obtain the necessary permits for exploration, and those of a lessee whose hopes are drowned by impossible weather, equipment failures, financial setbacks, or any number of other circumstances beyond the lessee's control. In either case, the lessee contracted for the exclusive opportunity to explore in a certain area; the inability of a lessee to explore, if not attributable to the Government, does not create an entitlement to any refund of the consideration paid to obtain the lease.

Id. at 18a.

Judge Newman dissented. In Judge Newman's view, this case presented a simple issue: "[W]hether the government shall deal fairly and legally with its contracting partners." App. 21a. Petitioner and the government had entered into a contract under which petitioner had purchased an entitlement to explore its tracts, which was later eliminated by the enactment of the OBPA. *Id.* at 20a. As Judge Newman explained:

> While it was the objection of North Carolina that led to the prohibition of exploration of the Outer Banks, first by state refusal to certify the exploration, then by [Congress's] enactment of the Outer Banks Protection Act, and then by the refusal of the Secretary of Commerce to override the state's objection, this does not justify the federal government's confiscation of Marathon's payment for a contract entered into before any such objection arose.

Id. at 20a-21a. The post-contract events that made it impossible for the government to perform its promise to "'timely and fairly consider' exploration plans that were properly submitted," *id.* at 21a, "were all outside the control of Marathon," *id.* at 22a. Applying both "hornbook law," *id.*, and a "wealth of precedent," *id.* at 23a, Judge

Newman concluded that the "withdrawal of [petitioner's] federal right," *id.*, required "return of the federal consideration," *id.* As Judge Newman explained, any other result would relieve the government of its duty to "deal fairly and legally with its contracting partners." *Id.* at 21a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS HOLDING THAT GOVERNMENT CONTRACTS ARE GOVERNED BY THE LAW APPLICABLE TO PRIVATE CONTRACTS.

In this case, the Federal Circuit incorrectly created a rule of law excepting the United States from the normal contract principles that (1) a party whose performance is made impossible, either by its own acts or through supervening events, "is not privileged to keep something for nothing, and restitution is an available remedy against [it]." 5 Arthur Linton Corbin, *Corbin on Contracts* § 1102, at 549 (1964) and (2) a party who makes its own performance of its contractual obligations impossible is in breach, *e.g.*, *United States* v. *Winstar Corp.*, 518 U.S. 839, 870 (1996). Ignoring these rules, the majority opinion of the Federal Circuit held that, having accepted $78 million from petitioner in exchange for the contractual right to explore its OCS tracts, the United States was nonetheless entitled to "keep something for nothing" when subsequent events, including subsequent federal legislation, made its performance impossible and extinguished petitioner's bargained-for rights.

The Federal Circuit's decision is in direct conflict with well-established contract law and—absent intervention by this Court—will upset the long-settled expectation that

"[t]he United States does business on business terms," *United States* v. *National Exch. Bank*, 270 U.S. 527, 534 (1926). The Federal Circuit has exclusive jurisdiction over appeals from the Court of Federal Claims, see 28 U.S.C. § 1295(a)(3), which is the *only* court to which the owners of OCS leases and other government contractors may bring contract actions against the federal government, see *id.* §§ 1346(a)(2), 1491. There accordingly will rarely, if ever, be a conflict among the Circuits regarding issues raised in contract disputes with the United States. However, as this Court has noted, the rules that the Federal Circuit applies are "a matter of special importance to the entire Nation." *Cardinal Chem. Co.* v. *Morton Int'l, Inc.*, 508 U.S. 83, 89 (1993). This Court has not in the past hesitated to grant review in cases involving issues of recurring importance to the relationship between the federal government and private litigants. See, *e.g.*, *Gardner* v. *Brown*, 5 F.3d 1456 (Fed. Cir. 1993), *cert. granted*, 511 U.S. 1017 (1994). In fact, in light of the overriding national importance of the law governing the government's contracts with private parties, this Court has in recent years twice granted certiorari—in the absence of a circuit split—in order to review decisions of the Federal Circuit in government contract cases. See *Hercules Inc.* v. *United States*, 24 F.3d 188 (Fed. Cir. 1994), *cert. granted*, 514 U.S. 1049 (1995); *Winstar Corp.* v. *United States*, 64 F.3d 1531 (Fed. Cir. 1995), *cert. granted*, 516 U.S. 187 (1996).[8]

1. Three years ago, this Court reaffirmed the long-standing principle that " '[w]hen the United States enters

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[8] This Court has also twice before granted certiorari, in the absence of a circuit split, to correct misconstructions of the OCSLA and other statutes relevant to OCS leasing. *See Watt* v. *Energy Action Educ. Found.*, 454 U.S. 151 (1981); *Secretary of the Interior* v. *California*, 464 U.S. 312 (1984).

into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals.'" *Winstar*, 518 U.S. at 895 (quoting *Lynch* v. *United States*, 292 U.S. 571, 579 (1934)) (plurality opinion). See also *id.* at 911 (Breyer, J., concurring) (same); *id.* at 919-24 (Scalia, J., concurring in judgment) (same). *Accord Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 369 (1943) ("'[t]he United States does business on business terms'") (quoting *National Exch. Bank*, 270 U.S. at 534); *Perry* v. *United States*, 294 U.S. 330, 352 (1935) ("When the United States, with constitutional authority, makes contracts, it has rights and incurs responsibilities similar to those of individuals who are parties to such instruments. There is no difference . . . except that the United States cannot be sued without its consent.") (citation omitted); *United States* v. *Bostwick*, 94 U.S.. 53, 66 (1876) (same); *Cooke* v. *United States*, 91 U.S. 389, 398 (1875) (same).

One fundamental principle of the "law applicable to contracts between private individuals" is that when a party's performance of its obligations under a contract is made impossible by supervening events, the contract may be rescinded and the parties returned to the status quo ante by restitution of the consideration paid. "[A] party who is excused from performance by supervening impossibility is not privileged to keep something for nothing, and restitution is an available remedy against him." 5 Corbin, *supra*, § 1102, at 549 (1964). *Accord Restatement (Second) of Contracts* § 377 & cmt. a (1981) (restitution appropriate where performance excused by supervening impossibility); *id.* § 264 (restitution appropriate when government regulation renders performance impossible); *Restatement of Restitution* § 108(c) (1937) (same); 18 Walter H.E. Jaeger, *Williston on Contracts* § 1972, at 224-27 (3d ed. 1978) (same). Thus, when performance

of a contract becomes impossible through no fault of either party, rescission of the contract and restitution of any consideration paid is an appropriate remedy. See, *e.g.*, *Winstar Corp. v. United States*, 994 F.2d 797, 818-19 (Fed. Cir. 1993) (Newman, J., dissenting), *rev'd on reh'g*, 64 F.3d 1531 (Fed. Cir. 1995) (*en banc*), *aff'd*, 518 U.S. 839 (1996); *Bishop Trust Co. Ltd.* v. *Kamokila Dev. Corp.* v. *Askew*, 453 F.2d 819, 831 (5th Cir. 1971).

Contrary to this well-settled rule, the Federal Circuit held below that "the inability of a lessee to explore, if not attributable to the Government, does not create an entitlement to any refund of the consideration paid to obtain the lease." App. 18a. Even accepting *arguendo* the Federal Circuit's underlying assumption that Congress's enactment of the OBPA "essentially had no effect," *id.* at 14a, and that the "real reason" that the Secretary did not approve the Manteo Unit's POE was North Carolina's CZMA objection as correct—which it is not [9]—petitioner nevertheless was entitled to restitution. In this case, the Secretary failed to perform his contractual duty to "timely

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[9] The Federal Circuit's conclusion that the cause of the United States' failure to approve the Manteo Unit's POE was North Carolina's CZMA objection is both factually and legally incorrect. First, the DOI's stated reason for refusing to approve the Manteo Unit's POE in September 1990—*i.e.*, within the 30-day period prescribed by the OCSLA, 43 U.S.C. § 1340(c)(1)—was the need to comply with the OBPA. *See* App. 194a. North Carolina's CZMA objection was credited to the DOI's own explanation of its decision, and the government's *post hoc* attempt to excuse the breach compelled by the OBPA must be rejected. *Cf. SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947) (reviewing court "must judge the propriety of [the agency's] action solely by the grounds invoked by the agency"). Indeed, North Carolina did not even register its CZMA objection to the Manteo Unit's POE until nearly *two months* after the date that DOI would, by its own admission, have been required to approve the POE, but for the OBPA. Finally, a State's CZMA objection is not under the OCSLA a ground for withholding approval of a POE. *See supra* at 5-6.

and fairly consider—not necessarily approve, but at least consider"—the Manteo Unit's POE, which the DOI had found to be "approvable in all respects." Even if North Carolina's CZMA objection—an event outside petitioner's control—is viewed as a "supervening event" that compelled the United States' failure, established principles of contract law entitled petitioner to restitution. Indeed, as Judge Newman observed, "[i]t is hornbook law that when a contract becomes impossible of performance through events outside the control of a party, restitution is an appropriate remedy." *Id.* at 22a.

Settled law also requires restitution in this case even if North Carolina's intractable CZMA objections are viewed as a barrier to petitioner's taking actions necessary to reap the benefits of its contract with the United States and its failure to overcome those objections as a failure on its part to "perform." [10] It is black-letter law that a plaintiff seeking restitution (as opposed to other forms of relief) need not prove that, even if the defendant had not breached, he would have been able to perform his own obligations and receive the benefits of his contract.

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[10] Relying on § 10 of the lease agreements—which provided that petitioner "shall comply with all regulations and orders relating to exploration, development, and production,'" App. 178a—the Federal Circuit attempted to side-step petitioner's claim for restitution by suggesting that it was petitioner (rather than the United States) that had failed to perform its obligation under its leases. *See id.* at 15a. However, the only "performance" required of petitioner under its OCS leases was paying up-front, cash "bonuses" of more than $78 million, making annual rental payments, and—if production ever began—paying royalties to the government. *See id.* at 174a; *see also id.* at 176a-178a (§§ 4-7). Petitioner was not required to submit POEs or PODs for any of its tracts, and in fact did not do so for its one non-Manteo tract. Moreover, a failure to secure a State's CZMA concurrence is not a failure to "comply" with the OCSLA or a breach of an OCS lease; it is merely grounds for the Secretary to require modification of a particular POE, or to deny a particular drilling permit or POD.

> A contract . . . may be rescinded, and the purchase moneys paid in advance may be recovered, on the failure of the seller to perform, even though the purchaser could not have performed. *In an action to rescind and recover payments made on account of the purchase price*[,] *it is enough to show a breach by the seller*. . . . [W]hen the action is to enforce the contract or to recover damages . . . [plaintiff] must tender and prove his own readiness, willingness, and ability to perform.

Weintraub v. *Rungmar Realty Corp.*, 231 N.Y.S.2d 241, 244 (N.Y. Sup. Ct. 1962) (emphasis added); see also *id.* (buyer entitled to restitution of down payment where seller was in breach, even though buyer could not have performed his obligation to pay balance of purchase price at closing). *Accord* 4 Corbin, *supra*, § 978, at 928; *Bertrand* v. *Jones*, 156 A.2d 161, 167-69 (N.J. Super. 1959). In this case, the OBPA flatly *prohibited* the Secretary from performing his promise to "timely and fairly consider" the plans and applications (including the Manteo Unit's POE) necessary for petitioner to exploit *any* of its contractual rights to explore and develop *any* of its OCS leases (including its one non-Manteo tract). The United States was thus in breach, see *infra* at 24-26, and it was *irrelevant* to petitioner's claim for restitution (as opposed to other forms of relief which it did not seek) that it could not secure North Carolina's CZMA concurrence. In short, even if petitioner's duties under the leases included overcoming North Carolina's obdurate opposition to drilling off its coast, neither party to the lease agreements was able to perform, and the result required was restitution by the government, not "the federal government's confiscation of Marathon's payment[s]." App. 20a-21a (Newman, J., dissenting). The Federal Circuit's decision to the contrary thus conflicted with this Court's repeated holdings that government contracts are

governed by "the law applicable to contracts between private individuals," *Lynch* v. *United States*, 292 U.S. 571, 579 (1934).

2. The Federal Circuit's decision also conflicts with the well-established principle of contract law, which was recently reaffirmed by this Court in *Winstar*, that the government is liable for breach of contract when, by its own legislative acts, it makes performance of its contractual obligations impossible. See, *e.g.*, *Far West Fed. Bank* v. *Office of Thrift Supervision-Director*, 119 F.3d 1358, 1364-65 (9th Cir. 1997); *Stone Forest Indus., Inc.* v. *United States*, 973 F.2d 1548, 1552 (Fed. Cir. 1992). See also *E.H. Boly & Son, Inc.* v. *Schneider*, 525 F.2d 20, 23-24 (9th Cir. 1975). In *Winstar*, the United States had entered into contracts in which it specifically promised to permit certain thrifts to use special accounting methods in exchange for their acquiring failing thrifts. 518 U.S. at 867-68. Thereafter, Congress enacted legislation requiring federal regulators to prohibit them from using those accounting methods. *Id.* at 868-69. This Court held that, because Congress had made it impossible for the government to perform its promise under the contracts, it was in breach. See *id.* at 870 (plurality opinion); *id.* at 918 (Breyer, J., concurring); *id.* at 919 (Scalia, J., concurring in judgment).

Under *Winstar*, the OBPA plainly placed the United States in breach of its lease agreements with petitioner. Although the government had, in those lease agreements, promised to "timely and fairly consider" petitioner's plans and permit applications, the OBPA made its performance of that promise impossible. The OBPA first imposed an absolute, 13-month ban on the Secretary's performance of his duties. Thereafter, it unilaterally imposed onerous and unanticipated conditions on the Secretary's performance—conditions which were not satisfied with respect to

the Manteo Unit's first POE until April 1992, and which were *never* satisfied with respect to any other plan or application that petitioner was entitled to submit. See, *e.g.*, *Placid Oil Co.* v. *Humphrey*, 244 F.2d 184, 188-89 (5th Cir. 1957) (lessor's imposition of burdensome new conditions on oil lessee was breach of lease contract); *United States* v. *Western Cas. and Sur. Co.*, 498 F.2d 335, 339 (9th Cir. 1974) (unreasonable delay and imposition of new and onerous conditions on plaintiff constitutes breach); *VanHaaren* v. *State Farm Mut. Auto. Ins. Co.*, 989 F.2d 1, 6 (1st Cir. 1993) (same).

As the Court of Federal Claims reasoned, the government's OBPA-compelled failure timely to approve the Manteo Unit's POE in September 1990—*when no CZMA objection to that POE had been filed*—was an *actual* breach of the lease agreements. See App. 76a. Moreover, the enactment of OBPA's bar on Secretarial approval for any other POE or POD that petitioner might submit (including ones for its non-Manteo tract)—a bar which was not lifted until the OBPA was repealed four years after this suit was filed—was an *anticipatory* breach. See *id.*; see also *id.* at 78a ("Since defendant is now legislatively barred from performing, it is in breach. It is not necessary for plaintiffs to have actually submitted such exploration plans because it is clear defendant cannot and will not perform its end of the bargain as required by the OCSLA.").

The Federal Circuit's majority did not dispute (or even address) the Court of Federal Claims' holding that the enactment of the OBPA placed the government in "total breach" of petitioner's OCS leases by disabling it from approving *any* plans or applications that petitioner might submit. Instead, through judicial sleight of hand, the Federal Circuit mischaracterized petitioner's claim as re-

lating solely to the Secretary's refusal to act on the single POE submitted by the Manteo Unit, and then dismissed that claim by erroneously finding that the OBPA was not the "real reason" for the Secretary's failure to act. See App. 21a. (Newman, J., dissenting) ("The panel majority appears to misunderstand Marathon's argument."). In so doing, the Federal Circuit ignored this Court's recent reaffirmation of the settled rule that when, through post-contract legislation, the government makes performance of its contractual obligations impossible in *every* instance in which its performance would be required, it places itself in total breach of its contract. See *Winstar*, 518 U.S. at 870 ("When the law as to capital requirements changed in the present instance, the Government was unable to perform its promise and, therefore, became liable for breach.") (plurality opinion). See also *Far West Fed. Bank*, 119 F.3d at 1365-66 (awarding restitution where post-contract federal legislation prohibited the government from performing its contractual duties). Instead, the Federal Circuit crafted a rule—applicable by its terms only to the government—that such a "total breach" may be excused where an alternative reason for the government's failure to perform in *one* instance may be found. The Federal Circuit's decision thus conflicts with this Court's precedents and warrants review.

II. THE DECISION BELOW INVOLVES MATTERS OF OVERRIDING NATIONAL IMPORTANCE THAT WARRANT REVIEW NOW TO AVOID WIDESPREAD DISRUPTION AND UNCERTAINTY IN GOVERNMENT CONTRACTING.

The Federal Circuit's decision in this case creates profound uncertainty as to when the remedies of rescission and restitution are available against the federal government and calls into question the fundamental presumption of government contracting that "[t]he United States does

business on business terms," *United States* v. *National Exch. Bank*, 270 U.S. 527, 534 (1926). Under the ordinary rules of contracts, a private oil lease would be rescinded and restitution paid where the lessor had promised, for example, to honor reasonable requests by the lessee to enter the lease tract to explore for oil, but was thereafter prohibited from performing his promise by subsequent government action by a State. See *Restatement (Second) of Contracts* §§ 264, 377 (1981). And, restitution would clearly be available when the lessor, through his *own acts*—for example, adopting a rule prohibiting his employees from processing the lessee's requests—made his own performance impossible. See, *e.g.*, *E.H. Boly & Son, Inc.* v. *Schneider*, 525 F.2d 20, 23-24 (9th Cir. 1975).

Nonetheless, the Federal Circuit in this case carved a special exception for the government from the well-settled rules governing rescission and restitution by equating events making the government's performance of its end of a bargain impossible with events—such as "impossible weather, equipment failures, [and] financial setbacks," App. 18a—which merely make the fully performed bargain less valuable for the government's contracting partner. The Federal Circuit's decision thus casts into doubt one of the basic legal presumptions underlying not only the thousands of currently outstanding OCS leases,[11] but also untold billions of dollars of other government contracts. Under the Federal Circuit's decision, it is unclear even whether a government contractor who

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[11] At the end of 1997, there were 7,359 OCS leases outstanding. *See* Minerals Management Serv., U.S. Dep't of the Interior, *Mineral Revenues 1997*, at 34 (1998). In addition, during 1998 OCS lessees paid $1.32 billion in up-front bonuses for 1,157 new OCS leases. *See* Minerals Management Serv., U.S. Dep't of the Interior, *Mineral Revenues 1998*, at 51 (prelim. ed. 1999).

had delivered valuable goods to the federal government, and thereafter was denied payment because of a congressional appropriations embargo, would be entitled to the ordinary restitutionary remedy of simply getting his goods back.

The consequences of the uncertainty created by the Federal Circuit's decision will be drastic. As the Court of Federal Claims observed, "common sense suggests that no sophisticated oil and gas company with many years of experience in drilling for oil in offshore leased tracts would knowingly agree to pay the huge, up-front considerations here involved," App. 68a, without being able to predict whether, and under what circumstances, it could seek rescission and restitution if federal legislation later barred the United States from performing its end of the bargain. Likewise, no rational government contractor will comfortably deal with the government without the assurance that the common-law rules regarding rescission and restitution "applicable to contracts between private individuals," *Lynch* v. *United States,* 292 U.S. 571, 579 (1934), bind the government as well. This Court should accordingly grant review in this case to resolve the question whether the United States, after having accepted consideration from a government contractor, is required to return that consideration when subsequent government action bars it from performing its contractual obligations.

CONCLUSION

For the reasons stated above, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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August 11, 1999

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

97-5146

MARATHON OIL COMPANY and
MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.,
Plaintiffs-Appellees,

v.

UNITED STATES,
Defendant-Appellant.

Appealed from United States Court of Federal Claims
Judge James T. Turner

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by appellees, and a response thereto having been invited by the court and filed by the appellant *,

Upon consideration thereof, it is

ORDERED that the petition for rehearing be granted for the limited purpose of clarifying this court's opinion.

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* The mandate of the court will issue on May 20, 1999.

IT IS FURTHER ORDERED that the previous opinion of the court in this appeal is withdrawn. The new opinion accompanies this order.

IT IS FURTHER ORDERED that the suggestion for rehearing in banc is declined.

Circuit Judge NEWMAN dissents in a separate opinion.

Circuit Judge RICH, Circuit Judge MICHEL, Circuit Judge CLEVENGER, Circuit Judge SCHALL, and Circuit Judge BRYSON did not participate in the vote.

FOR THE COURT,

JAN HORBALY
Clerk

Dated: May 13, 1999

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

97-5146

MARATHON OIL COMPANY and
MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.,
Plaintiffs-Appellees,

v.

UNITED STATES,
Defendant-Appellant.

REVISED OPINION ISSUED: May 13, 1999

Before NEWMAN, PLAGER, and RADER, *Circuit Judges.**

Opinion for the court filed by *Circuit Judge* PLAGER. Dissenting opinion filed by *Circuit Judge* NEWMAN.

This is a contract dispute between a lessor, the United States ("Government"), and lessees, Marathon Oil and Mobil Oil (collectively "Marathon"), involving Outer Continental Shelf ("OCS") oil and gas leases on submerged lands off the coast of North Carolina. The dispute centers over the denial by the Government of the permits necessary before Marathon could engage in oil exploration, and the effect of legislation enacted subsequent to the parties entering the leases. The legislation imposed a temporary moratorium on oil exploration in the lease areas. Marathon initially pursued administrative appeals of its permit denials, then sued in the Court of

Federal Claims to recover its lease rental and up-front cash bonus payments. Marathon claimed that the legislation effected a material breach of the OCS leases. The Government denied the breach and presented a number of defenses. The Court of Federal Claims agreed with Marathon, finding that the Government had materially breached the leases. *See Conoco Inc. v. United States*, 35 Fed. Cl. 309 (1996). In a subsequent proceeding, the court awarded both Marathon and Mobil restitution of their up-front payments, in total over $156 million. *See Marathon Oil Co. & Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, No. 98-331C (Fed. Cl. July 24, 1997). Because the moratorium legislation was not the operative cause of Marathon's failure to obtain the required permits, the judgment of the Court of Federal Claims is reversed.

BACKGROUND

This case has a rather complicated legal and factual background. We summarize the salient law and the history of the case; for the full details see the exhaustive Court of Federal Claims opinion in *Conoco Inc. v. United States*, 35 Fed. Cl. 309, 314-19 (1996).

A.

The Outer Continental Shelf Lands Act of 1953 ("OCSLA"), 67 Stat. 462, *as amended*, 92 Stat. 629 (codified at 43 U.S.C. §§ 1331-1343 (1970)), establishes federal jurisdiction over submerged lands on the continental shelf beyond three miles from the coastline. (Submerged lands within the three mile limit fall within the jurisdiction of the individual coastal states.) *See* 43 U.S.C. §§ 1301, 1331(a) (1994).

Pursuant to the OCSLA, the Secretary of the Interior ("the Secretary") is authorized to grant oil and gas leases

on OCS lands through a competitive bidding process. *See id.* § 1337(a) (1994). OCS leases run initially for five to ten years, but may be extended for as long as drilling or production is taking place on the leased tract. Lease terms grant lessees the "exclusive right and privilege to drill for, develop, and produce oil and gas resources," in exchange for an up-front cash bonus and periodic lease payments.

Obtaining a lease is one thing; obtaining the necessary permits to first explore and then produce is another. The OCSLA statutory scheme calls for specific submission and approval requirements for each step in the process of exploration, development, and production of OCS-derived oil or gas. In addition to approvals from the Department of the Interior ("DOI"), approvals may also be required from various state and federal agencies.

The first step in the process, exploration, begins with submittal by the lessee to the Secretary of a plan of exploration ("POE"). *See* 43 U.S.C. § 1340(b), (c)(1). The plan must comply with all provisions of the statute, the extensive regulations prescribed by the statute, and the terms of the lease. When the plan with such modifications as may be necessary are found by the Secretary to so comply, the Secretary must approve the POE within thirty days unless the Secretary determines that the proposed activity under the lease would probably cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits, to the national security or defense, or the marine, coastal, or human environment, and the proposed activity cannot be modified to avoid such harm. *See id.* § 1340(c)(1) (1994) (incorporating the provisions of § 1334(a)(2)(A)(i)). The Secretary is authorized to suspend operations under the lease temporarily upon finding that a similar threat exists subsequently. *See id.* § 1334(a)(1)(B).

Once the POE is approved, the DOI may consider issuance of the permits and approvals that are required before actual drilling takes place. In applying for a required federal license or permit, an applicant whose activities will affect land or water uses in the coastal zone of a state—such as North Carolina—with a federally approved coastal zone management program must provide to the federal licensing or permitting agency a certificate that its proposed activities comply with the state's approved program. *See* 16 U.S.C. § 1456(c)(2) (1994). The Coastal Zone Management Act ("CZMA") requires state concurrence with an applicant's consistency certification. *See id.* § 1456(c)(3)(B)(i). If the state objects, an applicant may appeal that determination to the Secretary of Commerce. *See id.* § 1456(c)(3)(B)(i)-(iii). The Secretary of Commerce has authority to override the state's objection by finding that the POE is consistent with the CZMA objectives or is otherwise necessary for national security interests. *See id.*

In addition to the requirement for an approved POE, the implementation of which requires state concurrence (or override) under the CZMA, if the POE includes discharge of pollutants into the ocean a National Pollutant Discharge Elimination System ("NPDES") permit must be obtained from the Environmental Protection Agency ("EPA"). *See* Federal Water Pollution Control Act, 33 U.S.C. §§ 1311(a), 1342(a) (1994). Again, state concurrence under the CZMA is required before an NPDES permit may be granted. *See* 16 U.S.C. § 1456(c)(3)(A).

B.

The leases at issue were acquired in 1981 when Marathon Oil Company, Mobil Oil Exploration and Producing Southeast Inc., and Amerada Hess Corporation each bought ⅓ undivided interests in five North Carolina OCS

leases. The three corporations each paid the Government more than $78 million in front-end cash bonuses and subsequently paid the Government approximately $264,000 in annual rentals during the ten year primary term.

The first planned activity involving the leased land resulted from the combination of Marathon and other North Carolina OCS lessees into a single entity known as the Manteo Unit. The Manteo Unit proposed drilling one exploratory well about forty-five miles east of Cape Hatteras. In July, 1989, after initial objections to the proposed POE by the State of North Carolina, the state, the DOI, and the Manteo Unit operator entered into a Memorandum of Understanding ("MOU") calling for a special environmental review before the DOI would act on the Manteo Unit POE.

The Manteo Unit also needed to obtain a NPDES permit from the EPA for the POE. The permit was required because the POE included planned discharge of wastes into the ocean. *See* 33 U.S.C. §§ 1311(a), 1342(a).

The environmental review required by the MOU issued in June, 1990. Following review of the three-volume report, the DOI determined that the POE would not result in any significant environmental impacts and was deemed as far as the DOI was concerned, to be "approvable in all respects." However, on July 17, 1990, North Carolina objected to CZMA certification of Mobil's NPDES permit application.

Before any further action was taken, and before any permit requests were acted upon, Congress, in August, 1990, enacted the Outer Banks Protection Act ("OBPA") in direct response to environmental concerns raised by North Carolina. The OBPA essentially placed a temporary moratorium on exploration or development of the North Carolina OCS, and created an Environmental

Sciences Review Panel ("ESRP") to study the impact of any proposed OCS development, *see* OBPA § 6003(c)(3)(A).

Specifically, the OBPA prohibited DOI from approving any POEs, PODs, or permits to drill on the North Carolina OCS until the later of October 1, 1991, or forty-five days of continuous congressional session following DOI's receipt of an ESRP report and submission of a certificate by the Secretary reporting that he had sufficient information to carry out his responsibilities under the OCSLA, *see id.* § 6003(c)(3)(A)(ii)(I). In light of the enactment of the OBPA, the Mineral Management Service ("MMS") of the DOI suspended all leases offshore of North Carolina as of August 18, 1990, at the same time lifting the obligation to pay rentals on the leases.

In spite of the enactment of the OBPA, on August 20, 1990, Mobil, on behalf of the Manteo Unit, submitted its final plan of exploration to drill an exploratory well. On November 19, 1990, North Carolina officially objected to the Manteo Unit's certification that its exploration plan would comply with the CZMA. Unless overridden, North Carolina's objections to Mobil's CZMA certifications of the POE and the NPDES applications effectively barred the requested NPDES permit and any implementation of the POE.

The Manteo Unit partners pursued appeals of North Carolina's CZMA objections to the Secretary of Commerce. On September 2, 1994, Commerce found the proposed POE and proposed discharges of drilling wastes to be "neither consistent with the objectives of the CZMA nor necessary in the interests of national security," and declined to override North Carolina's objections.

In January, 1992, the ESRP issued a final report on the Manteo Unit POE to the Secretary of the Interior. The Secretary then issued a report to Congress in April, 1992, certifying that he possessed sufficient information to perform his obligations under the OCSLA for approval of the single-well POE. By the terms of the OPBA, the temporary moratorium imposed on secretarial action by the OBPA lifted after the next forty-five days of congressional session.

However, the Secretary on his own initiative then deferred approval of the POE until the MMS completed two ESRP-recommended studies. Following the Secretary's April 1992 certification, which MMS treated as lifting the OBPA's bar on exploration of the Manteo Unit, Mobil requested additional suspensions of the Manteo Unit leases until both the additional ESRP studies were completed and Mobil's appeals of North Carolina's 1990 CZMA objections were decided.

MMS lifted the North Carolina OCS lease suspension in November, 1994, after the MMS released the two ESRP-recommended studies and the Secretary of Commerce had declined to override North Carolina's objections to the Manteo Unit POE and NPDES permit applications. Congress repealed the OBPA in 1996. *See* Pub. L. No. 104-134 Title I, Department of the Interior § 109, 110 Stat. 1321-177 (1996).

C.

In October 1992, Mobil and Marathon, together with a number of other OCS oil and gas lessees of the Government, intervened in a breach of contract action before the Court of Federal Claims between the United States and Conoco over OCS leases off the coasts of Alaska, Florida, and North Carolina. Eventually, all the OCS lessees

reached compromise settlements with the Government, allowing entry of final judgments and cancellation of their leases. Marathon and Mobil, however, reserved the right to and maintained all claims with respect to the OBPA's effect on the OCS leases off the coast of North Carolina.

Thereafter, on cross-motions for summary judgment, the Court of Federal Claims held that the Government's "failure [to carry out its contractual obligations], under the restrictions adopted pursuant to the OBPA, was a material breach of the leases," entitling Mobil and Marathon to damages. *Conoco Inc. v. United States*, 35 Fed. Cl. 309, 331 (1996). The court reached its conclusion by finding that the OCS lease terms were not subject to future or subsequent statutes and their related regulations, including something as unforeseeable as OBPA. *See id.* at 323-24. Within the lease terms, the court found that the Government had a duty to consider lessees' POEs in a timely and fair manner. *See id.* at 328. The Court of Federal Claims concluded that "compliance with the OBPA compelled governmental breach by nonperformance accompanied by an anticipatory repudiation thereby giving rise to 'total breach.'" *Id.* at 327. In addition, the court determined that the Secretary of the Interior's powers under the OCSLA did not extend to the suspension of the leases for OBPA compliance. *See id.* at 329-30.

The court reviewed at length this court's opinion in *Winstar Corp. v. United States*, 64 F.3d 1531 (Fed. Cir. 1995), *aff'd*, 518 U.S. 839 (1996), and its application to the circumstances under which the United States may be liable for breach despite the sovereign acts doctrine. *See id.* at 331-34. Applying the four *Winstar* factors, the court found that the United States was liable for breach stemming from the OBPA because the Act violated the objective intent of the parties to the OCS leases

by prohibiting exploration and development, and because the parties' mutual assent as expressed in the leases cannot be subverted by a governmental change in environmental regulatory policies. *See id.* at 333-34.

The Court of Federal Claims rejected the government's defense of immunity under the sovereign acts doctrine. The court found that although the OBPA "may have been the result of developing environmental concerns, it was not an act of public, general applicability." *Conoco*, 35 Fed. Cl. at 336. Instead, the court determined that the OBPA was specifically targeted at the plaintiffs and prevented them from exercising their lease rights—exploration of the OCS offshore of North Carolina. *Id.* Because the OBPA "does not constitute a sovereign act," the court concluded that United States was liable for breach of contract. *Id.* In addition, the court determined that the related theory of unmistakability was inapplicable since it "stands or falls with the sovereign acts doctrine." *Id.* at 335.

Subsequently, the Court of Federal Claims held a hearing to determine if restitution of lessees' cash bonuses and rentals should be offset by the amount of benefits received by lessees before enactment of the OBPA. The court concluded that the Government had failed to identify a legally cognizable benefit and issued judgment in favor of lessees for the $156 million cash bonuses paid, but found that lessees were not entitled to a return of their annual lease rental payments. The Government appeals from the judgment of liability for material breach of contract and from the trial court's restitutionary award.

DISCUSSION

If there are no material facts in dispute precluding summary judgment—and neither party argues there are—

our task is to determine whether the judgment granted is correct as a matter of law. *See, e.g., Confederated Tribes of Colville Reservation v. United States*, 964 F.2d 1102, 1107 (Fed. Cir. 1992).

A.

The first question raised is whether the OCS leases are by their terms subject to the OBPA. If the leases as written are expressly subject to future legislation such as the OBPA, then the Government's enactment and enforcement of that act cannot be a breach of the OCS leases. Section 1 of the OCS leases provides that the lease is issued pursuant to the OCSLA and is:

> [S]ubject to the [OCS Lands] Act; Sections 302 and 303 of the Department of Energy Organization Act . . .; all regulations issued pursuant to such statutes and in existence upon the effective date of this lease; all regulations issued pursuant to such statutes in the future which provide for the prevention of waste and the conservation of the natural resources of the Outer Continental Shelf, . . .; *and all other applicable statutes and regulations.*

(Emphasis added.) The Court of Federal Claims interpreted the phrase "all other applicable statutes and regulations" as not including subsequent legislation such as the OBPA. *See Conoco*, 35 Fed. Cl. at 322-24. We agree. To read the original contract between the parties as incorporating all future actions, whether by statute or regulation, by one of the parties would raise serious questions about illusory contracts, and perhaps questions of due process and other constitutional concerns. Before interpreting a contract in that manner, there would have to be a much clearer statement of the parties' intent to so contract. In any event, because the outcome of the

case does not turn on this issue, we need not further dwell upon it.

We turn next to the question of the parties' obligations under the OCS lease. Lessees paid a substantial up-front cash bonus and annual rents in exchange for the "exclusive right and privilege to drill for, develop, and produce oil and gas resources." That right, however, was expressly conditioned on compliance with a complex fabric of statutory and regulatory provisions, which included involvement by both federal and state agencies. The lessees were both knowledgeable and sophisticated purchasers, and entered into these leases with their legal eyes wide open.

Section 10 of the lease, entitled "Performance," specifically states that lessees "shall comply with all regulations and orders relating to exploration, development, and production." Pursuant to the OCSLA and relevant regulations, lessees must obtain federal and state approvals and certifications before they may explore or develop the leased areas. *See* 43 U.S.C. § 1340. Accordingly, under the OCS lease, lessees' rights to exploration, development, and production were conditioned upon obtaining the necessary federal and state approvals.

As explained earlier, the regulatory scheme requires that lessees submit a POE for the Secretary of Interior's approval. *See id.* § 1340(c)(1). If the Secretary approves the POE, he may grant an exploratory license or permit if there is state concurrence under the CZMA; however, the statute is clear that:

> The Secretary shall not grant any license or permit for any activity described in detail in an exploration plan and affecting any land use or water use in the coastal zone of a State with a coastal zone management program . . . unless the State concurs or is conclusively presumed to concur with the consistency

> certification accompanying such plan . . . or the Secretary of Commerce makes . . . [such a] finding . . . .

43 U.S.C. § 1340(c)(2) (1994).

In this case, North Carolina objected from the beginning to the Manteo Unit's proposed exploration as being inconsistent with its coastal zone program under the CZMA. This led to the MOU between the Manteo Unit, the DOI, and the State of North Carolina in 1989. Pursuant to the MOU, MMS issued an environmental report in June, 1990. Although the DOI then concluded that the Manteo Unit's POE "complied in all respects with [DOI] regulations" and "[t]he Plan, together with its supporting information, [was] deemed to be approvable in all respects," this did not dispose of North Carolina's objections. Furthermore, North Carolina registered its objections to Mobil's and Marathon's NPDES certification of consistency in July 1990, and restated its objections to their POE's certification of consistency in November 1990; North Carolina maintained both of these objections throughout the time that the moratorium imposed by the OBPA was effective.

Whatever restraints on secretarial actions were imposed by the OBPA essentially had no effect upon these OCS leases because exploration could not proceed without North Carolina's concurrence in the POE's CZMA consistency certification or the override provided by law. *Cf. Secretary of the Interior v. California*, 464 U.S. 312, 341 (1984) (observing that states with approved CZMA plans "retain considerable authority to veto inconsistent exploration or development and production plans"). Thus, North Carolina's legally valid objection to the consistency certification left unfulfilled the requirement that the lessees demonstrate compliance with applicable statutes and regulations, compliance with which was a prerequisite to obtaining the necessary permits and licenses.

Lessees have not established that their inability to obtain secretarial approval of the POE and to undertake exploratory activity was caused by the moratorium rather than by the fact that they were unable to provide the necessary state concurrence to their certification of CZMA compliance. And even if the Secretary had felt constrained in acting on the application by the provisions of the OBPA, the law is clear that, had he been free to act, he could not have issued any permits for exploration so long as North Carolina's objections remained in force. *See Sun Oil Co. v. United States*, 572 F.2d 786, 804-06 (Ct. Cl. 1978) (finding that government delay in permit approval was irrelevant because it was not the primary cause of delay).

Congress specifically conditioned offshore oil exploration on the principle that environmental factors could not be ignored, and specifically made the activity subject to express compliance with extant coastal zone management programs. Under the circumstances of this case, to treat Marathon's failure to obtain the necessary approvals and permits for exploratory activity as a breach of contract by the Government would be to eviscerate these salutary protections of the nation's fragile coastal lands and waters. The trial court viewed the moratorium imposed by the OBPA as having indefinite duration and unavoidable consequences. In fact, appellees' failure to overcome North Carolina's objections resulted in a delay that preceded and extended throughout the period in which the OBPA was effective.

Marathon argues that this case is not just about a delay in the approval of the POE for the North Carolina OCS leases. Appellees characterize the OBPA as constituting a "continuing, open-ended prohibition of *any* exploration

of the North Carolina OCS and *any* development and production of oil and gas resources in that area." For the reasons noted, that is not a correct description of the OBPA. Even if it were, the argument ignores the fact that the lessees had failed to submit a POE that carried with it state concurrence with the CZMA consistency certification. The record shows that the state's objection to appellees' NPDES permit application was based on "Mobil's failure to provide data and information necessary to allow the State to conduct a proper consistency review of the proposal on its merits." Likewise, North Carolina's objection to the Manteo Unit POE CZMA consistency certification was due to the inadequacy of the information provided by Mobil.

Appellees argue further that North Carolina's CZMA consistency objection was not independent of the Government's actions because the Secretary of Commerce rejected lessees' request to override North Carolina's CZMA objections based "in large part on the OBPA and on the findings of the OBPA Panel." It appears from this that appellees' real complaint is that the Secretary of Commerce refused to override North Carolina's CZMA objections; this issue is not before us on appeal so we do not address it further.[1]

We have considered appellees' remaining arguments regarding contract breach, and find them unpersuasive.

B.

Appellees argue that even if their leases are subject to state objection over the CZMA consistency certification, the OCSLA provides for cancellation of the leases and restitution in such a situation. In support of their conten-

[1] We note that appellees have filed an action challenging the Secretary of Commerce's decision. *See Mobil Oil Exploration v. Brown*, 920 F. Supp. 1 (D.D.C. 1996).

tion, Marathon claims that 43 U.S.C. § 1337(b)(4) "shows that Congress intended lessees to receive compensation for their leases if the Government in any way precluded them from exploration." Section 1337(b)(4) entitles the lessee to "explore, develop, and produce the oil and gas contained within the lease area, conditioned upon due diligence requirements and the approval of the development and production plan required by this subchapter." We fail to see how this language shows any such intent. The OCSLA does give the Secretary authority to cancel the leases under certain circumstances, entitling a lessee to compensation. *See* 43 U.S.C. §§ 1334 (a)(2), (c)-(d); 1340(c)(1); 1351(h)(1)-(2). Those sections are not applicable to the case before us, and Marathon does not claim that they are.

Nor is there any other basis under the lease for the lessees to claim restitution of some or all of their money. The OCS lease grants lessees the "exclusive right and privilege to drill for, develop, and produce oil and gas resources," in exchange for an up-front cash bonus and periodic lease payments. This right, however, is contingent upon lessees' agreement to "comply with all regulations and orders relating to exploration," including the need for federal and state approvals. Therefore, "[u]nder the plain language of OCSLA, the purchase of a lease entails no right to proceed with full exploration, development, or production . . .; the lessee acquires only a priority in submitting plans to conduct those activities . . . [upon disapproval] no further exploration or development is permitted." *Secretary of the Interior v. California*, 464 U.S. at 339.

The Supreme Court has recognized that only the major oil companies can "risk paying a large [up-front] cash bonus to lease a tract of unknown value." *See Watt v. Energy Action Educ. Found.*, 454 U.S. 151, 154 (1981).

In this case, Mobil and Marathon bid and paid the cash bonuses on the expectation that the leased lands contained substantial oil reserves and could be made productive. *See* James C. Cox *et al.*, *OCS Leasing and Auctions: Incentives and the Performance of Alternative Bidding Institutions*, 2 Sup. Ct. Econ. Rev. 43, 51-52, 54 (1983) (explaining that a bidding process like the OCS lease system which produces a variable, high cash bonus combined with a fixed, low royalty rate places most of the development risk upon the winning bidder rather than on the Government). We see no principled distinction between a lessee whose hopes for large rewards from such a lease are frustrated by a failure to obtain the necessary permits for exploration, and those of a lessee whose hopes are drowned by impossible weather, equipment failures, financial setbacks, or any number of other circumstances beyond the lessee's control. In either case, the lessee contracted for the exclusive opportunity to explore in a certain area; the inability of a lessee to explore, if not attributable to the Government, does not create an entitlement to any refund of the consideration paid to obtain the lease. *See* Thomas J. Touhey *et al.*, 4 *Government Contracts* § 28.40[2], at 28-111 (1998); *cf. Sun Oil*, 572 F.2d at 806.

Since we find no basis for a restitutionary remedy, we need not address the parties' contentions with respect to the manner in which the Court of Federal Claims calculated the amount of restitution.

Marathon and amici make much of the economic consequences of an adverse decision to the future of oil exploration on the OCS. Their fears are overstated, or at the least misplaced. The narrow issue in this case is the impact of the OBPA on the particular leases at issue. We conclude that the lease agreement in this case has not been breached by either party. Rather, Marathon has

been unable to obtain the necessary Government approvals that would allow it to go forward with exploration of the lease site, a problem for Marathon that arose in 1989, before the OBPA was enacted, and continued after the OBPA was repealed. This is not a case of a supervening act that makes performance impossible, but simply a playing out of the express provisions of the agreement.

The OBPA was not the cause of Marathon's inability to obtain issuance of the required permits and approvals for its proposed oil exploration, and there is no evidence of a breach of contract by the United States. There is no other basis on which Marathon can claim a return of its contract payments.

CONCLUSION

The judgment of the Court of Federal Claims in Marathon's favor is

REVERSED.

NEWMAN, *Circuit Judge*, dissenting.

This is a contract case. The Court of Federal Claims, determining that the contract between Marathon [2] and the United States was made impossible of performance by governmental action, held that Marathon is entitled to recover what it paid the government for the now-barred contract rights, $156,000,000 paid up-front.

The legal issue is not complex. When one party to a contract prevents the other party from achieving the benefit for which it paid, the party who prevents the performance can not retain the consideration it accepted for the performance. It was not a "failure to obtain the required

[2] I use "Marathon" to include both appellees, Marathon and Mobil.

permits" through fault of Marathon that barred the exploration of the Manteo tract; it was the change of government policy after the exploration rights had been sold and paid for. Marathon does not challenge the government's change of policy; nor does Marathon seek damages, or specific performance, or other interesting things. Marathon just wants its money back.

The Court of Federal Claims, applying simple contract principles, ordered the government to return this payment. My colleagues now authorize the government to keep it. That is not the law, and it is not responsible government dealing. I must, respectfully, dissent.

DISCUSSION

Marathon and the government entered into a standard exploration and development contract under the Outer Continental Shelf Lands Act, for the Manteo and an adjacent tract of the Outer Banks, 48 miles offshore North Carolina. In accordance with the Act, 43 U.S.C. '1337(b)(4) "entitle(s) the lessee to explore" its tracts. That entitlement was negated when the government refused to issue the requisite permits, barring all exploration. This refusal was at the behest of North Carolina, who obtained a congressional moratorium on exploration of the Outer Banks. When this moratorium ended in 1996 the federal government refused to override North Carolina's objection, although it had that right by statute. This eliminated Marathon's exploration right. While it was the objection of North Carolina that led to the prohibition of exploration of the Outer Banks, first by state refusal to certify the exploration, then by enactment of the Outer Banks Protection Act, and then by the refusal of the Secretary of Commerce to override the state's objection, this does not justify the federal government's con-

fiscation of Marathon's payment for a contract entered into before any such objection arose.

The panel majority, legitimizing the government's action, defines the issue as "the narrow issue of the impact of the Outer Banks Protection Act." That is inaccurate, for Marathon did not through this Act acquire a risk of forfeiture of its payment for exploration. Indeed, the panel majority raises no issues of "sovereign action" or other discarded theory, and simply rules that Marathon bore the risk that there would arise intractable state objections in which the federal government would acquiesce. However, the exploration of the outer continental shelf was and is within the control of the federal government. When the government tardily decided to withdraw exploration rights for the Outer Banks, contract law and fair dealing require that Marathon's payment for the right of exploration be returned. The issue is not whether Marathon can bear the risks of exploration, *see* maj. op. at 15, but whether the government shall deal fairly and legally with its contracting partners.

The panel majority appears to misunderstand Marathon's argument. For example, Marathon does not argue that every exploration plan it might have submitted must be approved (although the Department of the Interior described Marathon's Manteo tract plan as "the most comprehensive exploration plan ever submitted to the agency"). As the Court of Federal claims recognized, the governmental obligation was to "timely and fairly consider" exploration plans that were properly submitted. *Conoco Inc. v. United States*, 35 Fed. Cl. 309, 327 (Fed. Cl. 1996). The Outer Continental Shelf Lands Act set thirty days for this consideration. However, the Outer Banks Protection Act precluded action on Marathon's exploration plan during the OCSLA time frame.

The Outer Banks Protection Act was enacted after the contract with Marathon was made and paid for. These subsequent events were all outside of the control of Marathon. It is the government that prohibited performance of the contract. The common law of rescission and restitution, the statutory remedy of 43 U.S.C. '1334(a)(2)(C), and precedent, all require remedy for this post-contract negation of the government's promise.

It is hornbook law that when a contract becomes impossible of performance through events outside the control of a party, restitution is an appropriate remedy. *See* 5 *Corbin on Contracts* '1112 at 549 (1964) ("a party who is excused from performance by supervening impossibility is not privileged to keep something for nothing, and restitution is an available remedy against him"); *Restatement (Second) of Contracts* '272 (discussing forms of relief such as rescission when contract performance becomes impracticable), '264 (governmental regulation can render performance impracticable and be subject to relief), '377 (remedy of restitution is appropriate in cases of impracticability and frustration of contractual purpose).

In addition, the Outer Continental Shelf Lands Act provides that the Secretary of the Interior can disapprove an exploration plan based on perceived harm to the environment, and that when environmental harm or other causes of disapproval can not be avoided by the exploration, the Secretary may cancel the lease, but in such event "the lessee shall be entitled to compensation." 43 U.S.C. '1334(a)(2)(C). Potential causes of disapproval are listed in '1334(a)(2)(A)(i), *viz.*, "(i) continued activity pursuant to such lease or permit would probably cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral (in areas leased or not leased), to the national security or defense, or to the marine, coastal, or human environment." Environmental objections were raised by North Carolina. The government has not, however, cancelled Marathon's lease, although it has rendered exploration impossible by refusing the necessary permits, despite the Interior Department's ruling that Marathon's Plan of Exploration and environmental report were "approvable in all respects." Marathon's conceded compliance with the federal environmental criteria raises, at a minimum, issues of fair dealing when state objections are relied on for withdrawal of the federal right without return of the federal consideration.

A wealth of precedent illustrate the remedies of rescission and restitution when performance of a contract is rendered impossible. *E.g.*, *Stone Forest Industries v. United States*, 973 F.2d 1548 (Fed. Cir. 1992) (restitution of sums paid when intervening environmental legislation prevented performance of a timber contract); *Aerojet-General Corp. v. Askew*, 453 F.2d 819, 831 (5th Cir. 1971) ("The failure to render a promised performance may not be a breach of contract for the reason that performance has become impossible without fault; but it is nonetheless a failure of consideration discharging the other party from his duty to make the agreed return and giving him a right to the restitution of payments already made or other benefits already conferred.") (quoting 6 *Corbin on Contracts*, '1255); *E.H. Boly & Son, Inc. v. Schneider*, 525 F.2d 20, 23-24 (9th Cir. 1975) ("Any voluntary affirmative act of a party which renders substantial performance of his contractual duties impossible, or apparently so constitutes a total breach and warrants a suit seeking cancellation and restitution . . . . When one party repudiates a contract or commits a total breach thereof, the injured party has an election to pursue one of three remedies; he may treat the contract as at an end and sue for restitution, he may sue for damages, or he may sue for specific performance in certain cases.") (citations omitted).

The panel majority, authorizing the United States to keep Marathon's payment, explains that there is "no principled distinction" between payment for a right of exploration that has been performed but failed to find oil or encountered adversity such as weather, and payment for a right of exploration that has not been performed because it was prohibited by the government after it was paid for. According to the panel majority, in either case the government is entitled to retain the payment for the exploration right. This analysis is not supportable by any legal or equitable theory. What Marathon paid for was the right of exploration. Marathon bore the risk that the exploration might fail to find oil or gas, but Marathon did not bear the risk that exploration would be entirely barred, especially by the same party from whom it bought the right.

I do not fault the decision now to bar exploration of the Outer Banks; I fault the refusal to give back what Marathon paid for the right to explore the Outer Banks. Whatever the government's power to avoid its contractual obligations, this does not also entail the right to retain the consideration paid in contract. The Court of Federal Claims correctly analyzed the issues, applied the correct law, and reached a proper and just conclusion. That decision should be affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS FEDERAL CIRCUIT

No. 97-5146

MARATHON OIL COMPANY and
MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.,
Plaintiffs-Appellees,

v.

UNITED STATES,
Defendant-Appellant.

Oct. 15, 1998

Before NEWMAN, PLAGER, and SCHALL, Circuit Judges.

Opinion for the court filed by Circuit Judge PLAGER. Dissenting opinion filed by Circuit Judge NEWMAN.

PLAGER, Circuit Judge.

This is a contract dispute between a lessor, the United States ("Government"), and lessees, Marathon Oil and Mobil Oil (collectively "Marathon"), involving Outer Continental Shelf ("OSC") oil and gas leases on submerged lands off the coast of North Carolina. The dispute centers over the denial by the Government of the permits necessary before Marathon could engage in oil

exploration, and the effect of legislation enacted subsequent to the parties entering the leases. The legislation imposed a temporary moratorium on oil exploration in the lease areas. Marathon initially pursued administrative appeals of its permit denials, then sued in the Court of Federal Claims to recover its lease rental and up-front cash bonus payments. Marathon claimed that the legislation effected a material breach of the OCS leases. The Government denied the breach and presented a number of defenses. The Court of Federal Claims agreed with Marathon, finding that the Government had materially breached the leases. *See Conoco Inc. v. United States*, 35 Fed. Cl. 309 (1996). In a subsequent proceeding, the court awarded both Marathon and Mobil restitution of their up-front payments, in total over $156 million. *See Marathon Oil Co. & Mobil Oil Exploration & Producing Southeast, Inc. v. United States*, No. 92-331C (Fed.Cl. July 24, 1997). Because the moratorium legislation was not the operative cause of Marathon's failure to obtain the required permits, the judgment of the Court of Federal Claims is reversed.

BACKGROUND

This case has a rather complicated legal and factual background. We summarize the salient law and the history of the case; for the full details see the exhaustive Court of Federal Claims opinion in *Conoco Inc. v. United States*, 35 Fed. Cl. 309, 314-19 (1996).

A.

The Outer Continental Shelf Lands Act of 1953 ("OCSLA"), 67 Stat. 462, *as amended*, 92 Stat. 629 (codified at 43 U.S.C. §§ 1331-1343 (1970)), establishes federal jurisdiction over submerged lands on the continental shelf beyond three miles from the coastline. (Submerged lands within the three mile limit fall within the jurisdiction of the individual coastal states.) *See* 43 U.S.C. §§ 1301, 1331(a) (1994).

Pursuant to the OCSLA, the Secretary of the Interior ("the Secretary") is authorized to grant oil and gas leases on OCS lands through a competitive bidding process. *See id.* § 1337(a) (1994). OCS leases run initially for five to ten years, but may be extended for as long as drilling or production is taking place on the leased tract. Lease terms grant lessees the "exclusive right and privilege to drill for, develop, and produce oil and gas resources," in exchange for an up-front cash bonus and periodic lease payments.

Obtaining a lease is one thing; obtaining the necessary permits to first explore and then produce is another. The OCSLA statutory scheme calls for specific submission and approval requirements for each step in the process of exploration, development, and production of OCS-derived oil or gas. In addition to approvals from the Department of the Interior ("DOI"), approvals may also be required from various state and federal agencies.

The first step in the process, exploration, begins with submittal by the lessee to the Secretary of a plan of exploration ("POE"). *See* 43 U.S.C. § 1340(b), (c)(1). The plan must comply with all provisions of the statute, the extensive regulations prescribed by the statute, and the terms of the lease. When the plan with such modifications as may be necessary are found by the Secretary to so comply, the Secretary must approve the POE within thirty days unless the Secretary determines that the proposed activity under the lease would probably cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits, to the national security or defense, or the marine, coastal, or

human environment, and the proposed activity cannot be modified to avoid such harm. *See id.* § 1340(c)(1) (1994) (incorporating the provisions of § 1334(a)(2)(A)(i)). The Secretary is authorized to suspend operations under the lease temporarily upon finding that a similar threat exists subsequently. *See id.* § 1334(a)(1)(B).

Once the POE is approved, the DOI may consider issuance of the permits and approvals that are required before actual drilling takes place. In applying for a required federal license or permit, an applicant whose activities will affect land or water uses in the coastal zone of a state—such as North Carolina—with a federally approved coastal zone management program must provide to the federal licensing or permitting agency a certificate that its proposed activities comply with the state's approved program. *See* 16 U.S.C. § 1456(c)(2) (1994). The Coastal Zone Management Act ("CZMA") requires state concurrence with an applicant's consistency certification. *See id.* § 1456(c)(3)(B)(i). If the state objects, an applicant may appeal that determination to the Secretary of Commerce. *See id.* § 1456(c)(3)(B)(i)-(iii). The Secretary of Commerce has authority to override the state's objection by finding that the POE is consistent with the CZMA objectives or is otherwise necessary for national security interests. *See id.*

In addition to the requirement for an approved POE with state concurrence (or override) under the CZMA, if the POE includes discharge of pollutants into the ocean, a National Pollutant Discharge Elimination System ("NPDES") permit must be obtained from the Environmental Protection Agency ("EPA"). *See* Federal Water Pollution Control Act, 33 U.S.C. §§ 1311(a), 1342(a) (1994). Again, state concurrence under the CZMA is required before an NPDES permit may be granted. *See* 16 U.S.C. § 1456(c)(3)(A).

B.

The leases at issue were acquired in 1981 when Marathon Oil Company, Mobil Oil Exploration and Producing Southeast Inc., and Amerada Hess Corporation each brought ⅓ undivided interests in five North Carolina OCS leases. The three corporations each paid the Government more than $78 million in front-end cash bonuses and subsequently paid the Government approximately $264,000 in annual rentals during the ten year primary term.

The first planned activity involving the leased land resulted from the combination of Marathon and other North Carolina OCS lessees into a single entity known as the Manteo Unit. The Manteo Unit proposed drilling one exploratory well about forty-five miles east of Cape Hatteras. In July, 1989, after initial objections to the proposed POE by the State of North Carolina, the state, the DOI, and the Manteo Unit operator entered into a Memorandum of Understanding ("MOU") calling for a special environmental review before the DOI would act on the Manteo Unit POE.

The Manteo Unit also needed to obtain a NPDES permit from the EPA for the POE. The permit was required because the POE included planned discharge of wastes into the ocean. *See* 33 U.S.C. §§ 1311(a), 1342(a).

The environmental review required by the MOU issued in June, 1990. Following review of the three-volume report, the DOI determined that the POE would not result in any significant environmental impacts and was deemed as far as the DOI was concerned, to be "approvable in all respects." However, on July 17, 1990, North Carolina objected to CZMA certification of Mobil's NPDES permit application.

Before any further action was taken, and before any permit requests were acted upon, Congress, in August,

1990, enacted the Outer Banks Protection Act ("OBPA") in direct response to environmental concerns raised by North Carolina. The OBPA essentially placed a temporary moratorium on exploration or development of the North Carolina OCS, and created an Environmental Sciences Review Panel ("ESRP") to study the impact of any proposed OCS development, *see* OBPA § 6003(c)(3)(A).

Specifically, the OBPA prohibited DOI from approving any POEs, PODs, or permits to drill on the North Carolina OCS until the later of October 1, 1991, or forty-five days of continuous congressional session following DOI's receipt of an ESRP report and submission of a certificate by the Secretary reporting that he had sufficient information to carry out his responsibilities under the OCSLA, *see id.* § 6002(c)(3)(A)(ii)(I). In light of the enactment of the OBPA, the Mineral Management Service ("MMS") of the DOI suspended all leases offshore of North Carolina as of August 18, 1990, at the same time lifting the obligation to pay rentals on the leases.

In spite of the enactment of the OBPA, on August 20, 1990, Mobil, on behalf of the Manteo Unit, submitted its final plan of exploration to drill an exploratory well. On November 19, 1990, North Carolina officially objected to the Manteo Unit's certification that its exploration plan would comply with the CZMA. Unless overridden, North Carolina's objections to Mobil's CZMA certifications of the POE and the NPDES applications effectively barred the issuance of any of the requested permits or approvals for exploration.

The Manteo Unit partners pursued appeals of North Carolina's CZMA objections to the Secretary of Commerce. On September 2, 1994, Commerce found the proposed POE and proposed discharges of drilling wastes to be "neither consistent with the objectives of the CZMA

nor necessary in the interests of national security," and declined to override North Carolina's objections.

In January, 1992, the ESRP issued a final report on the Manteo Unit POE to the Secretary of the Interior. The Secretary then issued a report to Congress in April, 1992, certifying that he possessed sufficient information to perform his obligations under the OCSLA for approval of the single-well POE. By the terms of the OPBA, the temporary moratorium imposed on secretarial action by the OPBA lifted after the next forty-five days of congressional session.

However, the Secretary on his own initiative then deferred approval of the POE until the MMS completed two ESRP-recommended studies. Following the Secretary's April 1992 certification, which MMS treated as lifting the OBPA's bar on exploration of the Manteo Unit, Mobil requested additional suspensions of the Manteo Unit leases until both the additional ESRP studies were completed and Mobil's appeals of North Carolina's 1990 CZMA objections were decided.

MMS lifted the North Carolina OCS lease suspension in November, 1994, after the MMS released the two ESRP-recommended studies and the Secretary of Commerce had declined to override North Carolina's objections to the Manteo Unit POE and NPDES permit applications. Congress repealed the OBPA in 1996. *See* Pub.L. No. 104-134 Title I, Department of the Interior § 109, 110 Stat. 1321-177 (1996).

C.

In October 1992, Mobil and Marathon, together with a number of other OCS oil and gas lessees of the Government, intervened in a breach of contract action before the Court of Federal Claims between the United States and

Conoco over OCS leases off the coasts of Alaska, Florida, and North Carolina. Eventually, all the OCS lessees reached compromise settlements with the Government, allowing entry of final judgments and cancellation of their leases. Marathon and Mobil, however, reserved the right to and maintained all claims with respect to the OBPA's effect on the OCS leases off the coast of North Carolina.

Thereafter, on cross-motions for summary judgment, the Court of Federal Claims held that the Government's "failure [to carry out its contractual obligations], under the restrictions adopted pursuant to the OBPA, was a material breach of the leases," entitling Mobil and Marathon to damages. *Conoco Inc. v. United States*, 35 Fed. Cl. 309, 331 (1996). The court reached its conclusion by finding that the OCS lease terms were not subject to future or subsequent statutes and their related regulations, including something as unforeseeable as OBPA. *See id.* at 323-24. Within the lease terms, the court found that the Government had a duty to consider lessees' POEs in a timely and fair manner. *See id.* at 328. The Court of Federal Claims concluded that "compliance with the OBPA compelled governmental breach by non-performance accompanied by an anticipatory repudiation thereby giving rise to 'total breach.'" *Id.* at 327. In addition, the court determined that the Secretary of the Interior's powers under the OSCLA did not extend to the suspension of the leases for OBPA compliance. *See id.* at 329-30.

The court reviewed at length this court's opinion in *Winstar Corp. v. United States*, 64 F.3d 1531 (Fed.Cir. 1995), *aff'd*, 518 U.S. 839, 116 S.Ct. 2432, 135 L.Ed.2d 964 (1996), and its application to the circumstances under which the United States may be liable for breach despite the sovereign acts doctrine. *See id.* at 331-34. Applying the four *Winstar* factors, the court found that

the United States was liable for breach stemming from the OBPA because the Act violated the objective intent of the parties to the OCS leases by prohibiting exploration and development, and because the parties' mutual assent as expressed in the leases cannot be subverted by a governmental change in environmental regulatory policies. *See id.* at 333-34.

The Court of Federal Claims rejected the government's defense of immunity under the sovereign acts doctrine. The court found that although the OBPA "may have been the result of developing environmental concerns, it was not an act of public, general applicability." *Conoco*, 35 Fed. Cl. at 336. Instead, the court determined that the OBPA was specifically targeted at the plaintiffs and prevented them from exercising their lease rights—exploration of the OCS offshore of North Carolina. *Id.* Because the OBPA "does not constitute a sovereign act," the court concluded that United States was liable for breach of contract. *Id.* In addition, the court determined that the related theory of unmistakability was inapplicable since it "stands or falls with the sovereign acts doctrine." *Id.* at 335.

Subsequently, the Court of Federal Claims held a hearing to determine if restitution of lessees' cash bonuses and rentals should be offset by the amount of benefits received by lessees before enactment of the OBPA. The court concluded that the Government had failed to identify a legally cognizable benefit and issued judgment in favor of lessees for the $156 million cash bonuses paid, but found that lessees were not entitled to a return of their annual lease rental payments. The Government appeals from the judgment of liability for material breach of contract and from the trial court's restitutionary award.

DISCUSSION

If there are no material facts in dispute precluding summary judgment—and neither party argues there are—our task is to determine whether the judgment granted is correct as a matter of law. *See, e.g., Confederated Tribes of Colville Reservation v. United States*, 964 F.2d 1102, 1107 (Fed.Cir.1992).

A.

The first question raised is whether the OCS leases are by their terms subject to the OBPA. If the leases as written are expressly subject to future legislation such as the OBPA, then the Government's enactment and enforcement of that act cannot be a breach of the OCS leases. Section 1 of the OCS lease provides that the lease is issued pursuant to the OCSLA and is:

> [S]ubject to the [OCS Lands] Act; Sections 302 and 303 of the Department of Energy Organization Act . . .; all regulations issued pursuant to such statutes and in existence upon the effective date of this lease; all regulations issued pursuant to such statutes in the future which provide for the prevention of waste and the conservation of the natural resources of the Outer Continental Shelf, . . .; *and all other applicable statutes and regulations.*

(Emphasis added.) The Court of Federal Claims interpreted the phrase "all other applicable statutes and regulations" as not including subsequent legislation such as the OBPA. *See Conoco*, 35 Fed. Cl. at 322-24. We agree. To read the original contract between the parties as incorporating all future actions, whether by statute or regution, by one of the parties would raise serious questions about illusory contracts, and perhaps questions of due process and other constitutional concerns. Before interpreting a contract in that manner, there would have to

be a much clearer statement of the parties' intent to so contract. In any event, because the outcome of the case does not turn on this issue, we need not further dwell upon it.

We turn next to the question of the parties' obligations under the OCS lease. Lessees paid a substantial up-front cash bonus and annual rents in exchange for the "exclusive right and privilege to drill for, develop, and produce oil and gas resources." That right, however, was expressly conditioned on compliance with a complex fabric of statutory and regulatory provisions, which included involvement by both federal and state agencies. The lessees were both knowledgeable and sophisticated purchasers, and entered into these leases with their legal eyes wide open.

Section 10 of the lease, entitled "Performance," specifically states that lessees "shall comply with all regulations and orders relating to exploration, development, and production." Pursuant to the OCSLA and relevant regulations, lessees must obtain federal and state approvals and certifications before they may explore or develop the leased areas. *See* 43 U.S.C. § 1340. Accordingly, under the OCS lease, lessees' performance included obtaining the necessary federal and state approvals for exploration, development, and production.

As explained earlier, the regulatory scheme requires that lessees submit a POE for the Secretary of Interior's approval. *See id.* § 1340(c)(1). If the Secretary approves the POE, he may grant an exploratory license or permit if there is state concurrence under the CZMA; however, the statute is clear that:

> The Secretary shall not grant any license or permit for any activity described in detail in an exploration

> plan and affecting any land use or water use in the coastal zone of a State with a coastal zone management program . . . unless the State concurs or is conclusively presumed to concur with the consistency certification accompanying such plan . . . or the Secretary of Commerce makes . . . [such a] finding. . . .

43 U.S.C. § 1340(c)(2) (1994).

In this case, North Carolina objected from the beginning to the Manteo Unit's proposed exploration as being inconsistent with its coastal zone program under the CZMA. This led to the MOU between the Manteo Unit, the DOI, and the State of North Carolina in 1989. Pursuant to the MOU, MMS issued an environmental report in June, 1990. Although the DOI then concluded that the Manteo Unit's POE "complied in all respects with [DOI] regulations" and "[t]he Plan, together with its supporting information, [was] deemed to be approvable in all respects," this did not dispose of North Carolina's objections. Furthermore, North Carolina registered its objections to Mobil's and Marathon's NPDES certification of consistency in July 1990, and restated its objections to their POE's certification of consistency in November 1990; North Carolina maintained both of these objections throughout the time that the moratorium imposed by the OBPA was effective.

Whatever restraints on secretarial actions were imposed by the OBPA essentially had no effect upon these OCS leases because exploration could not proceed without North Carolina's concurrence in the POE's CZMA consistency certification or the override provided by law. *Cf. Secretary of the Interior v. California,* 464 U.S. 312, 341, 104 S.Ct. 656, 78 L.Ed.2d 496 (1984) (observing that states with approved CZMA plans "retain considerable authority to veto inconsistent exploration or development and production plans"). Thus, North Carolina's legally valid objection to the consistency certification left unfulfilled the lessee's obligation under the contract to demonstrate compliance with applicable statutes and regulations, compliance with which was a prerequisite to obtaining the necessary permits and approvals.

Lessees have not established that the delays that occurred in obtaining secretarial approval of the POE were caused by the moratorium rather than by the fact that they were unable to provide the necessary state concurrence to their certification of CZMA compliance. And even if the Secretary had felt constrained in acting on the application by the provisions of the OBPA, the law is clear that, had he been free to act, he could not have issued any permits for exploration so long as North Carolina's objections remained in force. *See Sun Oil Co. v. United States,* 215 Ct.Cl. 716, 572 F.2d 786, 804-06 (1978) (finding that government delay in permit approval was irrelevant because it was not the primary cause of delay).

Congress specifically conditioned offshore oil exploration on the principle that environmental factors could not be ignored, and specifically made the activity subject to express compliance with extant coastal zone management programs. Under the circumstances of this case, to treat the denial of the POE as a breach of contract by the Government would be to eviscerate these salutary protections of the nation's fragile coastal lands and waters. The trial court viewed the moratorium imposed by the OBPA as having indefinite duration and unavoidable consequences. In fact, appellees' failure to overcome North Carolina's objections resulted in a delay that preceded and extended throughout the period in which the OBPA

was effective. Appellees cannot recover for this delay. *See William F. Klingensmith, Inc. v. United States,* 731 F.2d 805, 809 (Fed.Cir.1984) (stating the general rule that courts will deny recovery where both parties contribute to the delay and the contractor has not established its delay apart from that attributable to the government); *Law v. United States,* 195 Ct.Cl. 370, 385 (1971) (placing burden on contractor to show that the work was delayed due to the lack of approval); *Wunderlich Contracting Co. v. United States,* 173 Ct.Cl. 180, 351 F.2d 956, 964-65 (1965) (noting that the "proliferating effects" of the Korean war contributed heavily to the difficulties encountered and that plaintiffs failed to carry their burden in proving that the delays or extra expenses were directly caused by the Government's actions); *Commerce Int'l Co. v. United States,* 167 Ct.Cl. 529, 338 F.2d 81, 89-90 (1964) (applying the rule that "there can be no recovery where the defendant's delay is concurrent or intertwined with other delays").

Marathon argues that this case is not just about a delay in the approval of the POE for the North Carolina OCS leases. Appellees characterize the OBPA as constituting a "continuing, open-ended prohibition of *any* exploration of the North Carolina OCS and *any* development and production of oil and gas resources in that area." For the reasons noted, that is not a correct description of the OBPA. Even if it were, the argument ignores the fact that the lessees had failed to submit a POE that carried with it state concurrence with the CZMA consistency certification. The record shows that the state's objection to appellees' NPDES permit application was based on "Mobil's failure to provide data and information necessary to allow the State to conduct a proper consistency review of the proposal on its merits." Likewise, North Carolina's objection to the Manteo Uni POE CZMA consistency certification was due to the inadequacy of the information provided by Mobil.

Had North Carolina concurred in the CZMA certification of the POE, and the Secretary refused to grant a permit or license due to the OBPA, then appellees' contentions might have merit because they could invoke the contract law principle that a party hindering the other's performance is considered in breach. *See Wah Chang Corp. v. United States,* 151 Ct.Cl. 41, 282 F.2d 728, 733 (1960); *see also* Thomas J. Touhey *et al.,* 4 *Government Contracts* § 28.40[2], at 28-111 (1998) ("When the contract requires the possession of a permit or license from a state, municipality, or other authorizing agency, any delay in obtaining such a permit or license is a matter between the contractor and the issuing authority, unless the government in some manner has caused or contributed to the delay."); Walter H.E. Jaeger, 5 *Williston on Contracts* § 670, at 159 (3d ed.1961). But that is not the case before us.

Appellees argue further that North Carolina's CZMA consistency objection was not independent of the Government's actions because the Secretary of Commerce rejected lessees' request to override North Carolina's CZMA objections based "in large part on the OBPA and on the findings of the OBPA Panel." It appears from this that appellees' real complaint is that the Secretary of Commerce refused to override North Carolina's CZMA objections; this issue is not before us on appeal so we do not address it further.[1]

We have considered appellees' remaining arguments regarding contract breach, and find them unpersuasive.

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[1] We note that appellees have filed an action challenging the Secretary of Commerce's decision. *See Mobil Oil Exploration v. Brown,* 920 F.Supp. 1 (D.D.C. 1996).

B.

Appellees argue that even if their leases are subject to state objection over the CZMA consistency cerification, the OCSLA provides for cancellation of the leases and restitution in such a situation. In support of their contention, Marathon claims that 43 U.S.C. § 1337(b)(4) "shows that Congress intended lessees to receive compensation for their leases if the Government in any way precluded them from exploration." Section 1337(b)(4) entitles the lessee to "explore, develop, and produce the oil and gas contained within the lease area, conditioned upon due diligence requirements and the approval of the development and production plan required by this subchapter." We fail to see how this language shows any such intent. The OCSLA does give the Secretary authority to cancel the leases under certain circumstances, entitling a lessee to compensation. *See* 43 U.S.C. §§ 1334(a)(2), (c)-(d); 1340(c)(1); 1351(h)(1)-(2). However, 43 U.S.C. § 1351(h)(2)(A) clearly states that "lessee shall not be entitled to compensation" because of secretarial disapproval of activities that "do not receive concurrence by such State with respect to the consistency certification accompanying such plan pursuant to . . . such Act [16 U.S.C. § 1456(c)(3)(B)(i) or (ii)] and the Secretary of Commerce does not make the finding authorized by such Act [16 U.S.C. § 1456(c)(3)(B)(iii)]," *see* 43 U.S.C. §§ 1351(h)(1), (h)(1)(B).

Under these circumstances, a lessee's options are to "submit an amendment to such plan, or a new plan, to the Secretary of the Interior." *See* 16 U.S.C. § 1456(c)(3)(B). Furthermore, we note that under contract section 23, it is the Government's option to cancel the lease in a situation in which the lessees did not comply with OCSLA provisions because of their failure to obtain state concurrence.

Nor is there any other basis under the lease for the lessees to claim restitution of some or all of their money. The OCS lease grants lessees the "exclusive right and privilege to drill for, develop, and produce oil and gas resources," in exchange for an up-front cash bonus and periodic lease payments. This right, however, is contingent upon lessees' agreement to "comply with all regulations and orders relating to exploration," including the need for federal and state approvals. Therefore, "[u]nder the plain language of OCSLA, the purchase of a lease entails no right to proceed with full exploration, development, or production . . .; the lessee acquires only a priority in submitting plans to conduct those activities . . . [upon disapproval] no further exploration or development is permitted." *Secretary of the Interior v. California,* 464 U.S. at 339, 104 S.Ct. 656.

The Supreme Court has recognized that only the major oil companies can "risk paying a large [up-front] cash bonus to lease a tract of unknown value." *See Watt v. Energy Action Educ. Found.,* 454 U.S. 151, 154, 102 S.Ct. 205, 70 L.Ed.2d 309 (1981). In this case, Mobil and Marathon bid and paid the cash bonuses on the expectation that the leased lands contained substantial oil reserves and could be made productive. *See* James C. Cox *et al., OCS Leasing and Auctions: Incentives and the Performance of Alternative Bidding Institutions,* 2 Sup.Ct. Econ. Rev. 43, 51-52, 54 (1983) (explaining that a bidding process like the OCS lease system which produces a variable, high cash bonus combined with a fixed, low royalty rate places most of the development risk upon the winning bidder rather than on the Government). We see no principled distinction between a lessee whose hopes for large rewards from such a lease are frustrated by a failure to obtain the necessary permits for exploration, and those of a lessee whose hopes are drowned by im-

possible weather, equipment failures, financial setbacks, or any number of other circumstances beyond the lessee's control. In either case, the lessee contracted for the exclusive opportunity to explore in a certain area; the inability of a lessee to explore, if not attributable to the Government, does not create an entitlement to any refund of the consideration paid to obtain the lease. *See* Touhey *et al., supra* § 28.40[2], at 28-111; *cf. Sun Oil,* 572 F.2d at 806.

Since we find no basis for a restitutionary remedy, we need not address the parties' contentions with respect to the manner in which the Court of Federal Claims calculated the amount of restitution.

CONCLUSION

The OBPA was not the cause of Marathon's inability to obtain issuance of the required permits and approvals for its proposed oil exploration, and there is no other evidence of a breach of contract by the United States. There is no other basis on which Marathon can claim a return of its contract payments. The judgment of the Court of Federal Claims in Marathon's favor is

REVERSED.

PAULINE NEWMAN, Circuit Judge, dissenting.

I respectfully dissent from the reversal of the relief granted by the Court of Federal Claims. Although I agree that the United States did not breach this contract by deliberate acts in its derogation, as in the *Winstar* cases, it can not be gainsaid that the contract was made impossible of performance, whether as a matter of legislation, discretion, federalism, or politics, due to the continuing intervention of the State of North Carolina. In such case the contract was voided without the fault of either party, and Marathon and Mobil are entitled to relief in rescission and restitution. That is all the relief that was granted by the Court of Federal Claims. I would affirm the judgment of that court.

APPENDIX C

[Filed Jul. 24, 1997]

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 92-331 C

MARATHON OIL COMPANY and
MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST, INC.,

v.

THE UNITED STATES

JUDGMENT

Pursuant to the court's Order Directing Entry of Final Judgment, filed July 18, 1997,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 54, that judgment is entered in favor of plaintiff, MARATHON OIL COMPANY, in the amount of $78,242,368.59. Pursuant to RCFC 54(c), costs shall be allowed to said plaintiff ("the prevailing party"). [As all other counts in this civil action have been addressed, present judgment, now entered on the above captioned plaintiffs, concludes this litigation.]

DAVID A. LAMPEN
Clerk of Court

July 24, 1997 By: /s/ Illegible
Deputy Clerk

NOTE: As to appeal, 60 days from this date, see RCFC 72, re number of copies and listing of *all plaintiffs*. Filing fee is $105.00.

APPENDIX D

UNITED STATES COURT OF FEDERAL CLAIMS

No. 92-331 C

CONOCO INC.,
Plaintiff,

AMERADA HESS CORPORATION, *et al.*,
Third-Party Plaintiffs,

v.

THE UNITED STATES,
Defendant.

April 1, 1996*

OPINION

ROBINSON, Judge:

This matter originally came before the court on defendant's motion for summary judgment. Conoco Inc.'s ("Conoco") cross-motion for partial summary judgment, and third-party plaintiffs' ("plaintiffs") cross-motion for partial summary judgment. Oral argument was held on January 31, 1995.

On June 23, 1995, and August 8, 9 and 10, 1995, the court entered judgment pursuant to the some of the parties' joint motions to dismiss and stipulations for compromise settlements, pursuant to which, the Florida and Alaska lease claims of Conoco and plaintiffs were settled.

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* The Opinion previously issued on March 14, 1996, is withdrawn and is substituted by the Opinion issued this date.

Moreover, the North Carolina claims of Shell Offshore Inc., Shell Frontier Oil & Gas Inc., Shell Western E & P Inc., OXY USA Inc., and Conoco have also been settled. After settlement of the issues presented with respect to various oil and gas leases in the Gulf of Mexico, Bristol Bay, Alaska, and some of the leases offshore North Carolina, this case now involves only the remaining oil and gas leases granted by various government contracts to the remaining plaintiffs involving the Outer Continental Shelf ("OCS") off the coast of North Carolina, which plaintiffs purchased in competitive sales at various times in the 1980s.

In 1992, Conoco filed suit in this court alleging that certain legislative actions of defendant materially breached the contracts at issue, frustrated performance thereof, rendered such performance impracticable, or constituted a taking in violation of the Fifth Amendment of the United States Constitution. Other oil and gas companies [1] holding similarly affected leases were notified of their interests in the case pursuant to Rule 14(a)(1) and (b) of the Rules of the United States Court of Federal Claims ("RCFC"). As a result, nine of these oil companies filed suit on October 28, 1992 as third-party plaintiffs. These third-party plaintiffs included: Amerada Hess Corporation, Chevron USA Inc., Marathon Oil Company, Mobil Exploration & Producing U.S. Inc., Murphy Exploration & Production Company, Murphy Oil USA, Inc., OXY

1 Amerada Hess Corporation, Amoco Production Co., Chevron USA Inc., Marathon Oil Company, Mobil Oil Corporation, Mobil Exploration and Producing Southeast Inc., Mobil Exploration and Producing U.S. Inc., Mobil Exploration and Producing North America Inc., Murphy Exploration & Production Company, Murphy Oil USA, Inc., Odeco Oil & Gas Company, OXY USA Inc., Pennzoil Exploration and Production Company, Shell Offshore Inc., Shell Frontier Oil & Gas Inc., Shell Western E & P Inc., Texaco Inc., Texaco Exploration and Production, Inc., Union Oil Company of California.

USA Inc., Pennzoil Exploration & Production Company, and Shell Offshore Inc. Then, on October 28, 1995, eight more oil companies filed an RCFC 24 motion to intervene. The court granted their motion, and Amoco Production Company, Mobil Oil Corporation, Mobil Exploration & Producing North America Inc., Mobil Exploration & Producing Southeast Inc., Shell Frontier Oil & Gas Inc., Shell Western E & P Inc., Texaco Exploration and Production, Texaco Inc., and Union Oil Company of California were included in the case as intervenors.

In brief, plantiffs' complaints seek damages for breach of contract, restitution for the money paid in bonuses and annual rental payments, or, alternatively, the fair market value of the taken property. However, as will be discussed later, plaintiffs' motions do not require a ruling upon the taking issue. Defendant denies that any breach, frustration, or circumvention of the lease contracts or taking of plaintiffs' rights granted under the leases has occurred. By its motion for summary judgment, defendant seeks a ruling in its favor on all counts in plaintiffs' complaints. According to defendant, all of the government's actions were fully authorized by the lease agreements and, in any event, such actions, because of their broad public nature, have not given rise to any rights to recover compensation in damages for breach or restitution because they are shielded by the sovereign acts and unmistakability doctrines. Plaintiffs have moved for partial summary judgment on the breach of contract and restitution issues. For the reasons set forth below, plaintiffs' cross-motion for partial summary judgment is granted. With respect to defendant's motion for summary judgment on the taking issue, the court concludes that there is neither need nor sufficient evidence to resolve that issue in this opinion.

BACKGROUND

The OCS is the submerged land beneath navigable waters on the Continental Shelf beginning seaward of the coastal waters within the jurisdiction of the individual states. 43 U.S.C. §§ 1301(a), (b), 1331(a). Coastal states assert jurisdiction over the waters and submerged lands within three miles of their coasts; the OCS extends from these boundary lines outward. *Id.* The federal government asserts jurisdiction over the OCS and the mineral resources found there via the Outer Continental Shelf Lands Act ("OCSLA" or "the Act"), 43 U.S.C. § 1331 *et seq.*[2]

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[2] The OCSLA was passed in 1953 in order to establish the federal government's exclusive jurisdiction over the OCS and to foster the exploitation of the OCS's resources. Over the past forty-two years, over one hundred oil and gas lease sales have been conducted under the OCSLA and successful bidders have paid over $55 billion to the United States Treasury for the right to explore, develop and produce minerals under such leases. In 1978, Congress, in light of the country's pressing energy needs, overhauled the OCSLA and adopted a new statutory regime designed to serve a new declaration of national policy, one permitting "expeditious and orderly development subject to environmental safeguards . . ." 43 U.S.C. § 1332(3) (1988). However, the 1978 amendments also established detailed procedures and criteria for the Secretary of the Interior to follow in exercising his authority to grant leases. In sum, the OCSLA provided for the expeditious and orderly development of the OCS subject to environmental safeguards under a 4-phase framework: (1) preparation of a 5-year leasing plan; (2) lease sales; (3) lease exploration; and (4) lease development and production. Also, the Secretary was granted carefully limited authority to cancel a lease upon finding that the threat of "environmental harm" outweighed the advantage of continuing activity on the lease. Because Congress recognized that "environmental" cancellations would not be the fault of the lessees, Congress supplemented the lessee's other remedies for such cancellations with a statutory compensation formula. 43 U.S.C. § 1334(a), 1351(e). This 1978 legislation recognized that the "basic purpose" of the new regime was to promote the swift, orderly and efficient exploitation of the country's untapped domestic oil and gas resources in the OCS.

I. *Lease Acquisition*

The OCSLA authorizes the Secretary of the Interior ("SOI" or "Secretary") to sell leases to explore for oil and gas within the OCS through a competitive bidding system. 43 U.S.C. § 1337. The sale of OCS leases is a complicated multi-step process involving defined actions by the Secretary and other state and federal agencies. Among other things, the Secretary must formulate a five-year oil and gas leasing program that sets forth a schedule of proposed lease sales and indicates the size, timing, and location of leasing activity and reflecting, to the maximum extent possible, "a proper balance between the potential for environmental damage, the potential for the discovery of oil and gas, and the potential for adverse impact on the coastal zone." 43 U.S.C. § 1344(a). Prior to a lease sale, the Secretary must publish in the *Federal Register* a call for information regarding industry interest and environmental concerns relating to the proposed sale. 43 U.S.C. § 1344(c), (f). At least six months prior to a lease sale, the Secretary must study the sale's potential environmental impacts and issue a draft environmental impact statement ("EIS") regarding the lease sale followed by a period of hearings and comments leading to the approval of a final EIS. 43 U.S.C. § 1346(a). Next, the Secretary must make a preliminary decision about whether to proceed with the sale, based on information and options collected in a Secretarial Issue Document. If the decision is to proceed, the Secretary must publish a proposed Notice of Sale in the *Federal Register*. Thereafter, the Secretary must formally consult with the governors of affected states concerning the proposed Notice of Sale. If the Secretary decides to go forward with the sale, he must decide on how to conduct the lease sale and publish a final Notice of Sale, identifying the blocks available for leasing and the bidding system to be used. 43

U.S.C. § 1337(a)(8). After a waiting period of at least thirty days after the invitation for bids ("IFB") has been issued, the Secretary receives sealed competitive bids on the appointed day of sale and reviews them to determine the leases to be issued. Finally, a lease may be issued to each of the successful bidders. The Department of the Interior ("DOI") then issues OCS leases on standard, non-negotiable lease forms prepared by the DOI. Under the leases, the United States of America is the "Lessor." The "leased area" is generally a three-square mile tract. The terms of the leases usually are for five or ten years, but the terms are extendable so long as drilling or production is taking place on a leased tract. All OCS lessees must pay large cash bonuses as well as periodic lease payments for the potentially petrolific tracts they acquire. 43 U.S.C. § 1337.

In August 1981, August 1982, and September 1983, the government conducted lease Sale Nos. 56, 78 and RS-2 for fifty-three tracts off the coast of North Carolina (the "North Carolina leases"). Some of the tracts included in these sales, including several in the "Manteo" area of the OCS, were in deep water; technological and safety concerns had been voiced about leasing in that area. Plaintiffs,[3] or their predecessors in interest, paid a total of $354,658,363.80 in bonuses for the North Carolina leases and a total of $8,557,447.38 in annual rentals. *Parties' Stipulations at 77-83.* Of this amount, Conoco claimed that it paid $20,974,916 to purchase interests in nineteen leases offshore North Carolina and for the opportunity to explore oil and gas deposits, while third-

[3] These plaintiffs originally included: Conoco Inc., Amerada Hess Corporation, Amoco Production Company, Chevron USA Inc., Marathon Oil Company, Mobil Exploration and Producing Southeast Inc., Murphy Exploration & Production Company, OXY USA Inc., Shell Offshore Inc., and Union Oil Company of California.

party plaintiffs claim that they paid the government $341 million in bonuses and rentals for the leases. These leases are not adjacent to areas where production is already occurring. Accordingly, exploration of the tracts is an essential first step to determination of whether the leases have any ultimate value.

Under the OCSLA's statutory scheme, after acquiring these OCS leases, a lessee had to obtain not only the DOI's approval but also that of any involved state and federal agencies before taking any further action under the leases.[4] After the Secretary's approval of a plan of exploration ("POE") and completion of successful exploration operations, but prior to any oil and gas development and production pursuant to an OCS lease, a lessee must next submit a development and production plan to the Secretary for approval. 43 U.S.C. § 1351(a)(1). The production plan must include a description of the type and location of facilities and operations to be used, "the land, labor, material, and energy requirements associated with such facilities and operations" and the environmental and safety safeguards to be used. 43 U.S.C.

[4] Prior to commencing actual exploration activity pursuant to a lease, each lessee had to submit for approval by the Secretary a plan of exploration ("POE"), containing a schedule of anticipated exploration activities, a description of the equipment to be used, the location of each well to be drilled, and other pertinent information. 43 U.S.C. § 1340(c)(1), (3). The Secretary is required to approve the plan within thirty days if the requirements of the OCSLA and the regulations prescribed thereunder are met. However, if the Secretary determines that the proposed activity would likely cause serious harm or damage to life, property, mineral deposits, the national security or defense, or the marine, coastal or human environment, and the proposed activity cannot be modified to avoid such harm, the Secretary may not approve the plan. 43 U.S.C. § 1340(c)(1). The state's approval under the Coastal Zone Management Act of 1972 ("CZMA") may also be required, 43 U.S.C. § 1340(c)(2), and no exploration under the leases may commence until the exploration plan is fully approved.

§ 1351(a)(2). Plans must also include specific work to be performed. 43 U.S.C. § 1351(c). Before a development plan may be approved and a permit granted, the state must concur with the plan under the CZMA or the Secretary must make the appropriate findings under that act. 43 U.S.C. § 1351(d). Finally, the Secretary must issue a final EIS pursuant to the National Environmental Policy Act of 1969 ("NEPA"). If the lessee's development plan fails to provide adequate environmental safeguards, the Secretary must require modification to ensure compliance.

II. *Lease Terms*

The critical terms of the leases at issue are substantively identical. *See Parties' Stipulations* § 124 *et seq.*, at 55ff. The leases were entered into by and between the United States as lessor and plaintiffs as lessees. The lease agreements set forth the terms of the contracts as well as the rights and privileges conferred on the lessees. First and perhaps most importantly, the lease contracts provide:

> Sec. 1. *Statutes and Regulations.* This lease is issued pursuant to the Outer Continental Shelf Lands Act of August 7, 1953, 67 Stat. 462; 43 U.S.C. [§] 1331 et seq., as amended (92 Stat. 629), (hereinafter called the "Act"). The lease is issued subject to the Act; [Sections 302 and 303 of the Department of Energy Organization Act, 91 Stat. 578, 42 U.S.C. [§§] 7152 and 7153;] all regulations issued pursuant to the statute and in existence upon the Effective Date of this lease; all regulations issued pursuant to the statute in the future which provide for the prevention of waste and conservation of the natural resources of the Outer Continental Shelf, and the protection of correlative rights therein; and all other applicable statutes and regulations.

See Stipulated Exhibits ("SXs") 128-180, Sec. 1.

> *Sec. 2. Rights of Lessee.* The Lessor hereby grants and leases to the Lessee the exclusive right and privilege to drill for, develop, and produce oil and gas resources, except helium gas, in the submerged lands of the Outer Continental Shelf containing approximately . . . acres or . . . hectares. . . .
>
> These rights include:
>
> (a) the nonexclusive right to conduct within the leased area geological and geophysical explorations in accordance with applicable regulations;
>
> (b) the nonexclusive right to drill water wells within the leased area, unless the water is part of geopressured-geothermal and associated resources, and to use the water produced therefrom for operations pursuant to the Act free of cost, on the condition that the drilling is conducted in accordance with procedures approved by the Director of the Minerals Management Service or the Director's delegate (hereinafter called the "Director"); and
>
> (c) the right to construct or erect and to maintain within the leased area artificial islands, installations, and other devices permanently or temporarily attached to the seabed and other works and structures necessary to the full enjoyment of the lease, subject to compliance with applicable laws and regulations.

See Id., Sec. 2.

In regard to performance, Sec. 10 of the leases contain a provision requiring that the lessees comply with all regulations and orders relating to exploration, development and production. The lease terms also contain a

provision in Sec. 13 stating, "The Lessor may suspend or cancel this lease pursuant to Section 5 of the [OCSLA] and compensation shall be paid when provided by the Act." Section 5 of the OCSLA does not discuss lease suspensions.

III. *Post-lease Legislative Actions*

The owners of twenty-one of the North Carolina leases combined their leases into a single unit, the Manteo Unit, and proposed to drill one exploratory well about forty-five miles east of Cape Hatteras. The State of North Carolina expressed strong objections to the proposed well. In July 1989, a Memorandum of Understanding ("MOU") was reached among the State of North Carolina, the DOI, and the operator of the Manteo unit (a subsidiary of Mobil Oil Corporation), which provided for a special environmental review before the DOI could act on the Manteo Unit's POE.

In August 1990, as a result of enhanced environmental concerns and the successful legislative efforts of Congressman Walter Jones of North Carolina, Congress enacted the Outer Banks Protection Act ("OBPA") as part of a more comprehensive oil spill legislation package, which came immediately prior to Mobil's submission to the Secretary of a POE for the single Manteo Unit exploratory well. A month after the passage of the OBPA, in September 1990, the DOI announced that this POE would have been approved if not for the prohibitions contained in the OBPA. The OBPA directly impacted the OCSLA and profoundly affected plaintiffs' North Carolina leases. Without amending the OCSLA, the OBPA expressly prohibited the DOI from approving any POEs or otherwise permitting exploration, production, or development of the OCS offshore North Carolina until at least October 1, 1991. Thereafter, such activity was to be permitted only

after the Secretary certified to Congress that he has "sufficient" information to carry out his responsibilities under the OCSLA in approving a submitted POE and then the Secretary was required to wait at least "45 days" to continuous Congressional session to pass before approval could occur.[5]

The OBPA also provides that before the Secretary may make a certification to Congress, an Environmental Sciences Review Panel ("ESRP") must be convened to make findings and recommendations regarding the adequacy of available environmental data, including oceanographic, ecological, and sociological data, to make decisions regarding the exploration and development of the OCS off-shore North Carolina. If the Secretary's certification differs from the ESRP's findings and recommendations, the certification must provide a detailed justification for the differences. Only after these steps have been taken may the Secretary approve a POE on behalf of the DOI. Moreover, even if a lessee is able to obtain the

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[5] With respect to this embargo prior to October 1, 1991, the OBPA provides:

> (c) Prohibition of oil and gas leasing, exploration, and development
>
> (1) Prohibition
>
> The Secretary of the Interior *shall not*—
>
> (A) conduct a lease sale;
> (B) issue any new leases;
> (C) approve any exploration plan;
> (D) approve any development and production plan;
> (E) approve any application for permit to drill; or
> (F) permit any drilling,
>
> for oil or gas under the Outer Continental Shelf Lands Act [] on any lands of the Outer Continental Shelf offshore North Carolina.

33 U.S.C. § 2753(c)(1) (emphasis added).

Secretary's approval of a POE, these same restrictive procedures then must be followed in order to obtain approval of a plan of development.

The report of the ESRP was not submitted until January, 1992. As of February 15, 1994, studies regarding the Manteo Unit well were still being reviewed. Approval of drilling of this single exploratory well was delayed by the OBPA from its August 1990 effective date until early 1994. All operations under plaintiffs' North Carolina leases are currently suspended, in some cases since as early as October 1988. In each instance, the lease terms have been concomitantly extended and the rental payments suspended.

CONTENTIONS OF THE PARTIES

I. *Plaintiffs' Contentions*

Plaintiffs complain that after paying large sums of money to acquire these leases, the enactment and enforcement of subsequent legislation, the OBPA, materially breached binding contracts, the leases, into which the United States, as a party, had entered into with them and, further, that such legislation has not only made it impossible for them to take advantage of their leases but also has interfered with the Secretary's ability to perform his contractual duties. Plaintiffs contend that because of such material breaches by defendant, including the Secretary's failure to timely consider plaintiffs' POEs under the OCSLA, which the OBPA did not expressly repeal, defendant is liable to plaintiffs for damages. In this regard plaintiffs contend that although the DOI's standard lease forms do not explicitly state the lessor's obligations regarding approval of submitted POEs, in light of the express terms of the leases and the circumstances of their sale, the lessor nevertheless is contractually bound to fairly consider and

expeditiously act upon the lessees' POEs as well as any subsequent development and production plans that might follow. Otherwise, the bargain between the lessor and lessees would be illusory and would permit defendant's unilateral forfeiture of plaintiffs' lease bonuses with impunity. They argue forcefully that this is particularly true here because the government drafted the lease terms which were not subject to negotiation. Accordingly, plaintiffs seek restitution of the money they have paid to defendant in bonuses and annual rentals. Plaintiffs do not claim that defendant's failure to approve plaintiffs' POEs and grant the necessary permits breached their lease contracts, but only that defendant's failure at least to fairly consider their plans was a material breach.

Plaintiffs argue that even if the enactment of the OBPA is viewed only as a delay in exploration, defendant still has materially breached the leases. According to plaintiffs, there is a duty of good faith implied in every contract that neither party to a contract will do anything to prevent, hinder, or delay performance of the other party to that contract. Moreover, plaintiffs say that the contracts for the exploration or production of oil and gas contain covenants that the lessor will not delay development of the leased tracts. But, in contravention of such covenants, plaintiffs maintain that defendant has deliberately prevented them from receiving any benefits from their leases for years, and that such delay, which continues to this day, constitutes a material contract breach.

In the alternative, plaintiffs also contend that the OBPA has frustrated their performance of the leases, thereby entitling them to restitution. Plaintiffs say that a party's duty to perform under a contract may be discharged where an unexpected contingency occurs, the risk of which

was not allocated to either party, and which renders performance impracticable. Since the principal purpose of the leases has been frustrated, plaintiffs argue that their lease contracts should be deemed a nullity.

In sum, plaintiffs argue that by virtue of the terms of the leases, defendant was contractually obligated at least to fairly consider plaintiffs' POEs within a reasonable time after their submission and that, because of passage of the OBPA, when the DOI was divested of its power to properly and timely consider plaintiffs' POEs and either approve or disapprove them based upon their respective merits, defendant was in breach. Plaintiffs contend that not one of the defenses defendant has interposed, including the sovereign acts and unmistakability doctrines, has merit. Accordingly, plaintiffs seek a finding of a breach of their lease contracts and a judgment awarding damages. Alternatively, plaintiffs seek contract rescission and restitution of all payments made to the government.

II. *Defendant's Contentions*

A. Lease Rights and Expectancies

Defendant contends that the OCS leases do not grant plaintiffs an absolute right to explore or develop the areas subject to their leases. It argues that the sale of a lease is a distinct stage of the OCS administrative process, separate from the issuance of a federal permit to explore or develop. In other words, defendant claims that plaintiffs purchased the leases knowing full well that they might never be able to exploit them. According to defendant "an OCS lease only grants its holder a priority over others to subsequently submit [sic] for federal approval plans for exploration, production, or development." Nothing in the leases, says defendant, guarantees the lessees that any of permits will ultimately be granted.

Since the leases unequivocally state they are subject to the OCSLA, its regulations, and all other applicable statutes and regulations, defendant argues that plaintiffs had notice that the OCSLA establishes many requirements which have to be met before a permit for exploration can be granted. Defendant points out that plaintiffs were aware that the environmental impacts of their proposed activities had to be carefully studied and that their permits could be denied. Moreover, defendant says that even with approved POEs, lessees must then apply for permits to drill, which also require vast amounts of technical data, compliance with other acts, regulations and state and other environmental laws.

Defendant denies that it has breached any of the lease contracts or taken any property interest of plaintiffs and moves for summary judgment on all counts, including whether there has been a taking of plaintiffs' property interest in the North Carolina leases. Defendant essentially argues that plaintiffs' defined rights and expectancies as set forth in the lease agreements were extremely limited and that all actions taken by the government, i.e., enacting the OBPA and suspending the leases, were all contemplated by the lease agreements themselves. According to defendant, it has not breached the lease agreements because it has only suspended the leases and the regulations incorporated into the leases permit lease suspensions.

B. The effect of the OBPA suspensions

Defendant argues that the OBPA suspensions neither breach nor frustrate the purpose of the lease contracts. In this regard, defendant states that only three POEs were ever submitted for DOI approval by certain of the plaintiffs holding North Carolina leases.[6] Thus, defendant

[6] Third-party plaintiff Chevron submitted and subsequently received DOI approval of its POE but never took further steps to

argues that the OBPA did not bar exploration and development from ever occurring, but only imposed certain additional requirements on the DOI before it could approve a drilling permit. Further, defendant argues that plaintiffs have suffered no material harm due to the suspension of the North Carolina leases and the delayed CZMA review process for the Manteo Unit, because even if there were no OBPA, the status of plaintiffs' POEs would be no different than they presently are. According to defendant, plaintiffs cannot recover damages due to a delay unless that delay is solely attributable to defendant's unauthorized, improper acts which, according to defendant, have not occurred. Defendant argues the delay in implementing the pending POE for the Manteo Unit has actually been caused by plaintiffs' own inability to obtain CZMA concurrence from North Carolina. Defendant contends that suspension of the North Carolina leases is consistent with the terms of the leases. It says that the OBPA states that if insufficient information exists regarding the impact of oil and gas operations on the North Carolina OCS, the DOI must engage in further environmental review. Additionally, defendant argues that the OBPA is contemplated under the leases because it is "an applicable statute" as described in the leases here at issue.

Defendant argues that, in any event, the sovereign acts and unmistakability doctrines shield the government from liability.[7] Finally, defendant argues that plaintiffs did not

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explore its tract. Arco Exploration Company also received DOI approval of its POE along with North Carolina's concurrence but never actually explored its tract either.

[7] The sovereign acts doctrine shields the United States from liability for a breach of contract when federal legislative or executive actions interfere with a governmental contract when the interfering governmental action is "public and general." The unmistakability doctrine, which is closely tied to the sovereign acts doctrine, says that the government contractually waives neither

possess any expectancies that could be taken and, even if they did, the government's actions with respect to the North Carolina leases fall short of a taking in violation of the Fifth Amendment.

In sum, Defendant counters that plaintiffs' rights and expectancies as defined by the lease agreements were extremely limited, that all actions taken by defendant, i.e., suspending the leases, were contemplated by or specifically allowed by the plain meaning of the lease contracts, that the OBPA's added restrictions and the extent that plaintiffs' rights were limited thereby were shielded by the sovereign acts and unmistakability doctrines and that no taking has occurred in violation of the Fifth Amendment by virtue of passage of the OBPA.

DISCUSSION

Summary judgment pursuant to RCFC 56(c) is the appropriate means for disposing of a case or issue in which the movant or cross-movant is entitled to judgment as a matter of law and there are no genuine issues of material fact in dispute. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2509-10, 91 L.Ed.2d 202 (1986). The standard for whether there is a material issue of disputed fact is whether a reasonable finder of fact could return a verdict in favor of the non-movant. *Sweats Fashions, Inc. v. Pannill Knitting Co.*, 833 F.2d 1560, 1562 (Fed.Cir.1987). In determining entitlement to summary judgment, the court may look beyond the pleadings to determine in which party's favor the ques-

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its sovereign immunity nor its sovereign power to legislate, regulate, or tax unless that power is surrendered in "unmistakable terms."

tions of law will be resolved and whether any apparent issues of fact are merely illusory.

I. *Contract Interpretation*

A. Generally

Breach of contract is the central issue presented by the parties' respective motions for (partial) summary judgment. In order to decide this issue, as a threshold matter, it is necessary to ascertain the exact meaning of the contract terms, which define the parties' rights, liabilities, and responsibilities. Thus, in this case, contract interpretation necessarily precedes breach analysis. The purpose of contract interpretation is to crystalize the parties' objectively manifested intent, and this may involve interpretation of specific language or terms, explanation of ambiguities, risk allocation, and sometimes the consideration of extrinsic evidence for limited purposes. As stated by the Federal Circuit recently, the "principal objective in deciding what contractual language means is to discern the parties' intent *at the time the contract was signed.*" *Winstar Corp. v. United States,* 64 F.3d 1531, 1540 (Fed.Cir.1995) (emphasis added). Contract interpretation, a question of law properly disposed of on summary judgment, *P.J. Maffei Bldg. Wrecking Corp. v. United States,* 732 F.2d 913, 916 (Fed.Cir.1984), may be inextricably intertwined with underlying questions of material fact. *Beta Sys., Inc. v. United States,* 838 F.2d 1179, 1183 (Fed.Cir.1988). Although the Federal Circuit normally reviews this court's factual determinations for clear error and contract interpretations based thereon de novo, *C. Sanchez and Son, Inc. v. United States,* 6 F.3d 1539, 1544 (Fed.Cir.1993), summary judgment may only be granted on those issues presenting no questions of material fact. The process of deciding a motion for summary judgment involving issues of contract interpretation seldom lends itself to a linear analysis.

> Courts and boards follow no predetermined, well-defined analytical framework when giving a contract meaning through the interpretive process. One cardinal rule, however, is to seek to ascertain a single interpretation of the contract that reflects the parties' intent. This is generally done by using an objective standard to give a contract its legally enforceable meaning. . . . This process of interpretation is fluid rather than rigid. . . . If a 'clear' interpretation is found, analysis ends; otherwise, a circuitous evaluation of the other factors may ensue.

JOHN CIBINIC, JR. & RALPH C. NASH, JR., ADMINISTRATION OF GOVERNMENT CONTRACTS 143-44 (3d ed. 1995).

B. Interpretation of the North Carolina Lease Contracts

Before determining whether defendant has breached certain terms of plaintiffs' lease contracts, the court must first attempt to ascertain the exact meaning of the relavant lease terms. If these terms are clear and unambiguous, the court's process of interpretation in order to identify the objectively manifested intent of the parties is less arduous. If, however, the relevant terms are ambiguous, then contract interpretation becomes more complex and the court must use various interpretative tools, which allow the court to carve a path through the thorny entanglements of contract language. *See* CIBINIC & NASH, ADMINISTRATION 143-44 (3d ed. 1995).

1. Objectively Manifested Intent & Plain Meaning

Although the federal government's procurement procedures are carefully governed by statute and regulation, the formation and administration of government contracts are, for the most part, consonant with the principles of common law contracts. *Priebe & Sons, Inc. v. United*

States, 332 U.S. 407, 411, 68 S.Ct. 123, 124-26, 92 L.Ed. 32 (1947) (citing *United States v. Standard Rice Co.*, 323 U.S. 106, 111, 65 S.Ct. 145, 147, 89 L.Ed. 104 (1944)). To the extent that the Uniform Commercial Code ("U.C.C.") is not inconsistent with federal law, it is also commonly used to provide guidance in determining the rights and liabilities of the parties to a public contract. *See* JOHN CIBINIC, JR. & RALPH C. NASH, JR., FORMATION OF GOVERNMENT CONTRACTS 151 (2d ed. 1986). While Title 41 of the United States Code ("U.S.C.") and Title 48 of the Code of Federal Regulations ("C.F.R.") set forth special procedures and standards unique to contracts involving the government and a private contractor, the vast body of contract law contains universal principles applicable to all contracts, including those covered by the U.S.C. and C.F.R. Such principles provide invaluable guidance in contract interpretation. Contract interpretation is the process through which the objectively manifested intent of the parties as to what exactly they bargained for is determined. RESTATEMENT (SECOND) OF CONTRACTS §§ 200, 201 (1981). Contract interpretation constitutes an objective test; the standard is what a similarly situated reasonably prudent contractor would have understood the contract language to mean, not what the drafter or any other party subjectively intended the contract to mean. *City of Oxnard v. United States*, 851 F.2d 344, 347 (Fed.Cir.1988); *Badeley v. United States*, 31 Fed.Cl. 508, 511 (1994). If the intent of the parties can be discerned from the contract language as a whole and the parties' underlying purposes for entering into the contract, this interpretation will control. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 201, 202 (1981).

The intent of the parties to the leases here at issue may be readily ascertained from the language of Sec. 1 and a

careful reading of the contracts as a whole. Such an analysis suggests a plain meaning interpretation. The clause referring to "all other applicable statutes and regulations" makes no mention of future or subsequent legislation which might affect the lessees' rights and the procedures for submission of POEs. Within that same section, however, the drafters *were* explicit when they intended to call attention to future or subsequent action. For example, with respect to the applicable regulations, the drafters explained that they meant those regulations "issued pursuant to the statute and *in existence upon the Effective Date* of this lease" and "regulations issued pursuant to the statute *in the future*." Unquestionably, the drafters knew how to specify, and thereby expressly put the lessees on notice of, future or subsequent legislation because they did exactly that in connection with future regulations. In other words, the lessor, the government, in its use of the diction it selected in these leases, knew exactly what they wanted to encompass and what they wanted to omit. This supports application of the well-recognized maxim of legal interpretation, *expressio unius est exclusio alterius*, the expression of one thing is the exclusion of another. "Where certain things are specified in detail in a contract, other [terms] of the same general character relating to the same matter are generally held to be excluded by implication." *Nicholson v. United States*, 29 Fed.Cl. 180, 196 (1993) (citing GROVER C. GRISMORE, PRINCIPLES OF THE LAW OF CONTRACTS § 105, at 164 (1947)); *United Pac. Ins. Co. v. United States*, 204 Ct.Cl. 686, 692, 497 F.2d 1402, 1405 (1974). It is a "well accepted and basic principle [of contract interpretation]" that, wherever possible, contracts must be interpreted to give reasonable meaning to all provisions of the contract; such an interpretation is always preferable to one which collapses parts of the con-

tract into meaningless or superfluous redundancy. *Fortec Constr. v. United States*, 760 F.2d 1288, 1292 (Fed.Cir. 1985); *Reliable Bldg. Maint. Co. v. United States*, 31 Fed.Cl. 641, 643 (1994); *Sharpe Refrigeration, Inc. v. United States*, 30 Fed.Cl. 735, 738 (1994). To hold that application of the OBPA was within the objectively manifested intent of the parties to the North Carolina leases, as defendant suggests, would mean that the provisions in Sec. 1 should be read to include not only all future or subsequent regulations but also statutes. This would render the labored language, "*in existence* upon the Effective Date of this lease" and "issued pursuant to the statute *in the future*," unnecessary, ineffective, and confusing. This is precisely the result courts strive to avoid, and in this case, there is neither need nor justification to endorse this interpretation. Indeed, to read this language, as defendant would have the court do, injects ambiguity and confusion where none would otherwise exist.

Moreover, defendant's argument that the leases may be interpreted to include future or subsequent statutes and their related regulations is inconsistent with the underlying purposes of these lease contracts, which was to promote the discovery of new hydrocarbon resources. This underlying purpose provides further support for the interpretation that the parties' agreements covered only *existing* statutes and related present and future regulations specifically promulgated pursuant to the OCSLA for administering oil and gas exploration. Plaintiffs entered into these oil and gas leases, which are not materially different from many similar leases that had previously been entered into with many oil companies for the opportunity to explore and develop the petroleum resources of the OCS both offshore North Carolina and in other areas. The court's reading of the language of these leases indicates that at the time such leases were executed, none of the

parties to these leases anticipated or envisioned the enactment of the OBPA or any similar legislation approximately nine years later.[8] In the early '80s, neither the government nor plaintiffs had any inkling that the OBPA would be enacted. The facts show that only after passage of the OBPA did defendant broaden its interpretation of the scope of the lease agreements' conditions. Contract terms should be interpreted *without* "regard either to the probable intention of the parties contracting, or to the probable changes which they would [have] made in their contract, had they foreseen certain contingencies." WILLIAM W. STORY, A TREATISE ON THE LAW OF CONTRACTS § 639, at 562 (2d ed. 1847).

Defendant's position, that under OCSLA plaintiffs paid consideration for the mere possibility of exploiting limited and uncertain contractual rights is technically correct. Unquestionably, the Secretary, based upon a legitimate and factually supported finding of harm to the environment—i.e., a fair exercise of discretion—may disapprove POEs. However, the lease contracts here at issue cannot be construed to allow for such drastic unilateral interference by the government, through passage of highly restrictive legislation, the OBPA, with the lessees' bargained for rights of exploitation. Moreover, the government's further restriction of the lessees' rights, by simply legislating away the SOI's ability to consider plaintiffs' POEs, is not a right granted to the government, either expressly or impliedly by these leases. Such a broad and totally nullifying right simply cannot be found within the language of

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[8] Plaintiffs' contention that because the leases were defectively formed, i.e., with no meeting of the minds, the parties never reached a binding agreement is not persuasive. This contention is essentially a non-issue in this case because the undisputed evidence shows that each of the parties reached an explicit agreement with the government and that there was mutual assent as to the scope of their respective rights and liabilities.

the leases. No provision in plaintiffs' leases even alludes to the government's claimed ability to unilaterally modify or circumvent, with impunity, long established and respected POE approval and permit acquisition procedures established under OCSLA. Sec. 13 of the leases states only that the government could suspend or cancel the lease agreements as provided by § 5 of the OCSLA but would nonetheless have to pay compensation as required by that Act. Actually, Section 5 of the OCSLA does not discuss suspension of oil and gas leases. However, other portions of that Act provide that the lessor may suspend the leases "if there is a threat of serious, irreparable, or immediate harm or damage to life . . . to property . . . or to the marine, coastal, or human environment." 43 U.S.C. § 1334(a)(1). The accompanying regulations to the OCSLA confirm this suspension power but state that no such suspension should exceed five years unless it is properly extended. 30 C.F.R. § 250.10.

Accordingly, based upon the plain meaning of the terms of the leases issued in conformity with the OCSLA and all regulations applicable thereto, this court holds that the parties' objectively manifested intent revealed in the above provisions of the leases, precludes finding merit in defendant's interpretation of the leases. In short, the court is convinced that such a significant and external factor, as the OBPA undeniably is—one which would clearly reduce the value and materially alter the structure and framework of plaintiffs' North Carolina lease acquisitions and permit approvals, whether by abating the SOI's authority to consider the same or otherwise—cannot be read into these unambiguous lease terms. Moreover, common sense suggests that no sophisticated oil and gas company with many years of experience in drilling for oil in offshore leased tracts would knowingly agree to pay the huge, up-front considerations here involved for such tenu-

ous and unilaterally interruptable drilling rights. Plaintiffs acted responsibly in their purchase of these leases because the sums of money they paid were for the exclusive right and privilege to drill for, develop, and produce hydrocarbon resources in the leased areas during a specified initial period if they met the requirements of the OCSLA and its implementing regulations. Clearly, had any legislative embargo to the approval process been in the contemplation of the parties at the time of entry into the leases,[9] common sense leads to the conclusion that plaintiffs' winning competitive bids undeniably would have been less, perhaps significantly less.

2. Other Considerations

Plaintiffs urge this court to consider the weight of certain out of court statements set forth in plaintiffs' volumes of exhibits. Contract interpretation may be aided by other considerations [10], including an examination of the circum-

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[9] Defendant's legislative actions are inconsistent with the North Carolina leases in that the OBPA evaded the spirit of the bargain by compelling interference with or failure to cooperate in a party's performance. *See* RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. d (1981); U.C.C. §§ 1-201(19), 1-203. In the present case, defendant's obligation and ability to consider and possibly approve plaintiffs' POEs was fundamental to contract formation and performance. The government's enactment of the OBPA was, as plaintiffs contend, designed to politicize and indefinitely stall the DOI's normal procedures for consideration of POEs, thereby effectively barring the parties from performance of their respective duties under the North Carolina leases through a mechanism beyond the bounds of the contracts' terms. While this may, on the one hand, bring into question defendant's implied duty of good faith and fair dealing—though not necessarily by the SOI, which as an agency established by Congress is bound to follow Congressional dictates—this court need not decide that question because of the court's independent findings discussed above.

[10] The court determines that the North Carolina leases are clear and lend themselves to a plain meaning interpretation. Although

stances surrounding formation, even though such circumstances may not have been included within the four corners of the instrument itself. There are, however, limits

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the terms referring to "future and subsequent regulations" may have required interpretation, this need for construction does not amount to an ambiguity. If, for the sake of argument, the terms of the contract have some degree of ambiguity, any such ambiguity would be latent and the doctrine of contra proferentem, a firmly established doctrine of contract interpretation that places the risk of unfavorable contract interpretation on the party who drafted and proffered the contract provisions in question, would apply. *United States v. Seckinger*, 397 U.S. 203, 216, 90 S.Ct. 880, 887, 25 L.Ed.2d 224 (1970); *United Internat'l*, 33 Fed.Cl. at 370; CIBINIC & NASH, ADMINISTRATION 220-21 (3d ed. 1995). Even if the contract provisions here at issue were ambiguous, the interpretation would remain the same. When contract language is ambiguous, "that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds." RESTATEMENT (SECOND) OF CONTRACTS § 206 (1981).

Application of this doctrine is predicated on the requirement that the non-drafter's interpretation be reasonable, *United States v. Turner Constr. Co.*, 819 F.2d 283, 286 (Fed.Cir.1987), and mandates that latent ambiguities be construed against the drafter, the party with the responsibility and opportunity to reduce the agreement to a coherent, unambiguous, written instrument. *See Orange Cove Irrig. Dist. v. United States*, 28 Fed.Cl. 790, 799 (1993); *Gaston & Assocs., Inc. v. United States*, 27 Fed.Cl. 243, 247 (1992). The one exception to the application of contra proferentem is that the non-drafting party must neither have known nor had reason to know of the ambiguity; i.e., regardless of the reasonableness of the non-drafter's interpretation, the ambiguity must not have been glaring or so obvious as to invoke the non-drafter's duty to inquire. *Reliable Bldg.*, 31 Fed.Cl. at 644. Interpretation of ambiguous contract terms against the drafter is even more favored when the government dictated the provisions of the contract. *United States v. Seckinger*, 397 U.S. at 216, 90 S.Ct. at 887 (reasoning that the drafting party, the government, had "vast economic resources and stronger bargaining position in contract negotiations"); *Kiewit Sons' Co. v. United States*, 109 Ct.Cl. 390, 418, 1947 WL 5089 (1947) (stating that "[t]his rule is especially applicable to Government contracts where the contractor has nothing to say as to the

to such considerations. The parol evidence rule, a rule of substantive law rather than evidence, bars the introduction of extrinsic evidence antecedent to or contemporaneous with contract formation for the purpose of adding to, subtracting from, varying, or contradicting the terms of a written contract, which is final, complete, unambiguous, and unaffected by mistake, fraud, or accident. *California Sand & Gravel, Inc. v. United States*, 22 Cl.Ct. 19, 25 (1990). That is, where a contract is explicit and its terms unambiguous, the court is not at liberty to search for its meaning beyond the four corners of the instrument itself, and the use of auxiliary tools of contract interpretation, including extrinsic evidence and post-formation circumstances, is impermissible. *Nicholson*, 29 Fed.Cl. at 193-94; *Richmond, Fredericksburg & Potomac R.R. Co. v. United States*, 27 Fed.Cl. 275, 290 (1992). Nonetheless, certain extrinsic evidence may be used for the limited purpose of explaining the circumstances affecting a contract by shedding light on the parties' objective intent. *Kmart Corp. v. United States*, 31 Fed.Cl. 677, 681 (1994). However, contract interpretation, with or without extrinsic evidence, may never be used to discern the unilateral subjective intent of one or more of the parties.

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provisions."); *see also North Star Alaska Housing Corp. v. United States*, 30 Fed.Cl. 259, 268 (1993).

In this case, the government controlled the terms in these and many similar oil and gas leases. Any textual uncertainty was not immediately identifiable, and thus, did not trigger a duty of inquiry by plaintiffs. Application of contra proferentem would require that the provisions of Sec. 1 be construed so as not to include future and subsequent legislation. This conclusion is consistent with the other interpretive tools of contract construction, discussed above, and leads this court to conclude that, although the United States could certainly wield its sovereign power in enacting the OBPA, that act, nonetheless, may not retroactively be applied to the North Carolina leases without regard to and in derogation of plaintiffs' existing rights under the leases.

Alaska American Lumber Co. v. United States, 25 Cl.Ct. 518, 528 (1992); *see E.I. Du Pont De Nemours and Co. v. United States*, 24 Cl.Ct. 635, 638 (1991). Further, the significance of extrinsic evidence regarding events occurring after contract formation may be considered to determine whether they constitute modifications to the underlying contract. *Walter Dawgie Ski Corp. v. United States*, 30 Fed.Cl. 115, 126 (1993); *California Sand*, 22 Cl.Ct. at 26. Extrinsic evidence, however, must be distinguished from post-formation evidence that is more probative of subsequent events affecting the contract than of contract interpretation. Plaintiffs' voluminous post-lease moratoria exhibits ("PPLMX"), specifically testimony regarding the OBPA's effect on the North Carolina leases, fall into this latter category and do not qualify as extrinsic evidence that may be used for the purpose of contract interpretation.

The statements made by DOI officials regarding the OBPA are of little value in ascertaining the meaning of the contract terms. They amount to neither extrinsic evidence probative of the parties' understood agreement nor contract modifications. Rather, these statements only constitute one form of legislative history. As far as the North Carolina leases are concerned, these statements occurred after the fact, i.e., after contract formation. Testimony by DOI officials to the effect that obstruction of exploration and development of oil and gas offshore North Carolina through enactment of H.R. 3861, the OBPA, "*circumvent*[*s*] the nationwide provisions and standards of the OCS Lands Act" provides little support for plaintiffs' interpretation that the OBPA was not within the scope of the contracts at issue. *Review of Offshore Oil and Gas Programs & Laws, Oversight Hearings on H.R. 3861 Before the Subcommittee on Water, Power, and Offshore Energy Resources of the H.R. Committee on Interior &*

Insular Affairs, 101st Cong., 2d Sess. 56 (1990) (testimony of Edward Cassidy, Deputy Director, Mineral Mgmt. Serv., DOI). Moreover, the statements of DOI officials to the effect that "once you issue a lease and then if the government doesn't want to drill there, you find reasons why not, then you have a 'taking' and you've got to buy it back" do not conclusively establish that the bargain struck by the parties did not include a government safety valve through which subsequent legislation could flow, effectively barring oil and gas exploration offshore North Carolina. *DOI & Related Agencies Appropriations for 1990, Hearings Before the Subcommittee on the DOI & Related Agencies of the H.R. Committee on Appropriations, House Appropriations Hearings*, 101st Cong., 1st Sess. 379 (1989) (statement of Manuel Lujan, Jr., SOI, DOI).[11]

To some extent, this court can accept plaintiffs' interpretations of the DOI officials' statements regarding the OCSLA leasing program and the effect of the OBPA thereon. Further, it is logical to conclude, as the court

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11 With regard to the Florida and Alaska leases, Secretary Hodel of the DOI stated that exploration "moratoria" would "deny the rights of an oil and gas lease," take away the "contractual integrity" of the leases, and might constitute "act[s] of bad faith on the part of the Federal Government." PPLMX # 10. Secretary Lujan of the DOI observed that such moratoria would be "breaking faith" with the lessees. PPLMX # 21 at 379. Assistant SOI Griles stated that lease restrictions were "inconsistent with the rights of the lessees under their leases" and could constitute "bad faith on the part of the United States." PPLMX # 76 at 16, 35-36. Similarly, Assistant SOI O'Neal stated that the OBPA was "inconsistent with the terms of the leases" and "put the good faith of the Federal Government in question when post-lease restrictions are imposed on existing leases." PPLMX # 77 at 19, 44-46, 56, 87. The moratoria then at issue included the October 1988 Southwest Florida Leases Appropriations Ban, the October 1989 Bristol Bay Leases Appropriations Ban, the June 1990 Presidential "Off Limits" Decree affecting the Southwest Florida Leases, and the August 1990 enactment of the OBPA resulting in the instant litigation.

has discussed, that subsequent legislation that binds the key agency official's previously existing power to perform under a government contract may amount to a material breach of contract. The court cannot completely ignore the fact that these statements, uttered by high-level agency officials contemporaneous with passage of the OBPA, generally support plaintiffs' interpretation of the leases vis a vis the OBPA. Nevertheless, these statements, which are in the nature of admissions against interest, were made during the OBPA (H.R. 3861) hearing process and may reflect, *arguendo*, only a small cross-section of the DOI and Congressional membership, do not unambiguously explain the proper interpreation of the North Carolina lease terms. In any event, caution must be exercised when referring to statements found in the legislative history, whether they are made by legislators or lobbyists, to glean the intent of Congress vis a vis legislation. *Thompson v. Thompson*, 484 U.S. 174, 191-92, 108 S.Ct. 513, 522, 98 L.Ed.2d 512 (1988) (Scalia, J., concurring); *Piper v. Chris-Craft Indus. Inc.*, 430 U.S. 1, 26, 97 S.Ct. 926, 941, 51 L.Ed.2d 124 (1977). Even greater caution must be used, then, when referring to such evidence to interpret the terms of contracts that were formed many years before the enactment of subsequent legislation, whether or not such legislation has apparent impact upon such contracts.

II. *Breach of Contract*

A. The Contracts at Issue

To determine the merits of plaintiffs' claims for breach of contract, the court turns to the lease agreements in question, relying on the meaning ascertained through contract interpretation.[12] Under the lease agreements, plain-

[12] Although plaintiffs briefly argue that recovery be predicated on the doctrines of impracticability of performance and frustration of purpose, respectively, the case at bar does not turn on these theories of risk allocation and excuse of performance. Impracticability applies in scenarios where performance becomes unduly and exceptionally burdensome due to some usually unforeseeable change of circumstances. Frustration applies where unforeseen supervening events, the non-occurrence of which was a basic assumption to the venture, deprives a party of all contractual benefit and utterly defeats the purpose of performance, although there is no actual impediment to performance. The court finds it unnecessary to decide whether these theories of risk allocation lie in light of its breach of contract analysis.

tiffs paid large sums of money for the "exclusive right and privilege to drill for, develop, and produce oil and gas resources. . . ." The leases, however, are subject to the OCSLA and regulations issued pursuant to it, and, as defendant points out, do not guarantee that plaintiffs will be able to explore and develop the lease areas. Under the existing regulations, plaintiffs must obtain numerous federal and state approvals and certifications before they may explore and ultimately develop the leased areas. However, it is plaintiffs' inability to take part in this regulatory process as a result of the OBPA's restriction on the SOI's approval powers that is at the heart of their claim. Plaintiffs do not claim that defendant is in breach because it has not approved an exploration plan. Rather, they claim defendant is in breach because it cannot and will not even consider an exploration plan—a necessary step in the regulatory approval process. They argue that even if the leases do not clearly state on their face defendant's obligations regarding actual approval of exploration plans, there can be no doubt that defendant is contractually obligated at least to consider them. The court agrees.

The lease agreements do not specifically state the parties' obligations regarding exploration plans but provide that the lessees agree to "comply with all regulations and

orders relating to exploration." Under the OCSLA and its regulations, exploration may only be conducted pursuant to approved exploration plans. Thus, in order to explore, plaintiffs are obligated to prepare and submit exploration plans. The necessary reciprocal obligation is that the government will timely and fairly consider—not necessarily approve, but at least promptly consider—exploration plans properly submitted. Indeed, the OCSLA mandates that the Secretary "*shall* approve" exploration plans within thirty days unless determined that the plan "would probably cause serious harm or damage" and the plan could not be modified to avoid such harm. 43 U.S.C. § 1340(c)(1). If, as defendant contends, the government were under no obligation to consider facially compliant explorations plans, plaintiffs' purchases would have been an empty one. It is undisputed that obtaining an approved POE is necessary to plaintiffs' exploitation of their leases. Given the past course of dealing between petroleum companies and the DOI pursuant to earlier leases granted under the OCSLA, it seems apparent that plaintiffs would not have paid millions of dollars in bonuses and rents, if defendant's interpretation of the lease agreements is correct. As already noted under the lease agreements, defendant was contractually obligated to consider facially compliant POEs promptly and fairly. Any contrary interpretation would render the bargain illusory and subject to unilateral forfeiture. Clearly, the OBPA imposed severe, burdensome, new conditions upon the DOI's obligation under OCSLA to approve POEs offshore North Carolina, which were not contemplated by the parties when the leases were executed. Therefore, the court also finds that compliance with the OBPA compelled governmental breach by non-performance accompanied by an anticipatory repudiation thereby giving rise to "total breach."

Defendant relies heavily upon the Supreme Court's exploration of the OCS leasing process in *Secretary of Interior v. California*, 464 U.S. 312, 104 S.Ct. 656, 78 L.Ed.2d 496 (1984), to argue it was not at all contractually obligated to act on submitted exploration plans. When discussing OCS leases similar to the ones at issue in this case, the Court in *California* noted that:

> OCS lease sales are conducted by the [DOI]. Oil and gas companies submit bids, and the high bidders receive priority in the eventual exploration for and development of oil and gas resources situated in the submerged lands of the OCS. A lessee does not, however, acquire an immediate or absolute right to explore for, develop, or produce oil or gas on the OCS; those activities require separate, subsequent federal authorization.

464 U.S. at 317, 104 S.Ct. at 659. But it is the Court's further characterization of the lessees' rights under the leases that defendant cites to show that plaintiffs do not have the rights they assert. The Court stated that OCS lessees receive only "priority over other interested parties in submitting for federal approval a plan for exploration, production, or development." 464 U.S. at 337, 104 S.Ct. at 669. This is, of course, true, and plaintiffs do not contest this. However, it does not follow that the government may then short circuit the entire regulatory process by retracting the SOI's powers to consider submitted plans of lessees whatever their status vis a vis other potential lessees. It is here that plaintiffs' and defendant's interpretations part, for defendant refuses to recognize that the reciprocal rights granted to the parties under the contracts at issue provide that submission of plaintiffs' POEs is predicated on an unequivocal governmental duty to timely and fairly consider, though not necessarily ap-

prove, them. The power of approval is, as noted, the SOI's. *See* 43 U.S.C. § 1340(c)(1).

Having found the government contractually obligated to, at the very least, timely and fairly consider plaintiffs' POEs, it is an inescapable conclusion that defendant's failure to do so constitutes a breach. Defendant does not dispute that as a result of the OBPA, it cannot consider plaintiffs' POEs under the North Carolina leases. Since defendant is now legislatively barred from performing, it is in breach. It is not necessary for plaintiffs to have actually submitted such exploration plans because it is clear defendant cannot and will not perform its end of the bargain as required by the OCSLA.

Defendant makes many counter-arguments as to why it is not in breach. None of these arguments directly address the central aspect of its breach. Defendant's strongest response is that it is not in breach because its obligation to consider POEs has not come due. Defendant argues that it has suspended the leases, action defendant claims is allowed by the leases themselves, and concomitantly extended the lease terms so it does not have to consider any POEs. In this respect defendant argues, the regulations to which the leases are subject allow the defendant to suspend the leases. Because the leases have been suspended all obligations under the leases, i.e., paying rent and considering exploration plans, have likewise been suspended. Thus, defendant argues that because its obligations under the leases have also been suspended, it is not in breach. Plaintiffs do not challenge the government's authority or ability to suspend the leases but argue convincingly that, in this case, the suspensions were not effected in accordance with the applicable lease terms.

Of course, if the leases had actually authorized the suspensions here imposed, defendant would not be in breach. In that case, plaintiffs' rights to have POEs considered would likewise be suspended. That, however, is far from the case. The leases contain a provision relating to suspending the leases, according to which "[t]he Lessor may suspend or cancel this lease pursuant to Section 5 of the [OCSLA] and compensation shall be paid when provided by the Act." Perhaps more importantly, the leases indicate that they are subject to the OCSLA, all regulations promulgated thereunder, and all applicable statutes then-existing, which this court has determined does not include subsequently enacted legislation such as the OBPA. Thus, the extent to which the suspensions were proper under the terms of the lease contracts depends on whether such suspensions occurred pursuant to the OCSLA and its regulations. Plaintiffs argue that the denial of their rights under the leases cannot be justified by defendant's authority under the OCSLA and its regulations, because the OCSLA contemplates only "suspension" or "temporary prohibition," not open-ended, indefinite bars. Further, plaintiffs contend that, in any event, suspensions are justified only under defined circumstances, for example, if there is a threat of serious irreparable, or immediate harm. Plaintiffs argue that the facts show that the government, quite to the contrary, unilaterally suspended the leases not because of any such threat of harm, but rather because of the OBPA

Under the OCSLA the Secretary can establish regulations:

> (1) for the suspension or temporary prohibition of any operation or activity, including production, pursuant to any lease . . . *if there is a threat of serious irreparable, or immediate harm* or damage to life (in-

> cluding fish and other aquatic life), to property, to any mineral deposits (in areas leased or not leased), or to the marine, coastal, or human environment. . . .

43 U.S.C. § 1334(a) (emphasis added). The Secretary set forth regulations concerning suspension of the leases at 30 C.F.R. § 250.10, which sets out the situations under which the OCS leases may be suspended. Defendant attempts to justify its suspension actions under these regulations. Section 250.10(a) authorizes suspensions when additional time is needed for such things as facilitating proper development of leases, constructing transportation facilities, entering into sales contracts, and unforeseen delays due to such things as weather. Under 30 C.F.R. § 250.10(b), suspensions are authorized for such reasons as the lessee's failure to comply with provisions of law or the lease, in the interest of national security, conducting an environmental study and threat of serious, irreparable, or immediate harm or damage. Finally, suspensions under this section should not exceed five years.

The suspension notices sent to plaintiffs invoke defendant's suspension powers under 30 C.F.R. § 250.10 but state that the suspension is necessary in order to comply with the OBPA. The notices do not point to any environmental threats, risks of harm to life or the environment, or any other justification set forth in the regulations and the OCSLA. Indeed, the June 1990 Environmental Report, 'the most extensive and intensive environmental examination that had ever been afforded an exploration well in the OCS program." determined that the proposed exploration would not result in any significant impact on the Outer Banks marine environment. Defendant now argues that, while not stated in the suspension notices, the leases were suspended to conduct

further environmental studies as is authorized under § 250.10(b)(4).[13] However, such post hoc rationalizations must be viewed critically. *Sun Oil Co. v. United States*, 215 Ct.Cl. 716, 765, 572 F.2d 786, 815 (1978) (citing *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420, 91 S.Ct. 814, 825, 28 L. Ed.2d 136 (1971)). Defendant further argues that the lease suspensions must have been consistent with the terms of the lease contracts because plaintiffs themselves have "stipulated that the 'person who executed [the] suspension order[s] [subsequent to enactment of the OBPA] on behalf of the United States possessed authority to do so." *Df.'s Motion for Summary Judgment* at 44. This argument is unpersuasive. Merely because it it within an official's authority to take certain action is entirely a separate issue from whether such action was properly taken. The real issue is whether the Secretary's suspension of the leases pursuant to the OBPA breached the contracts, not whether it can be justified retroactively. *See Gulf Oil Corp. v. Morton*, 493 F.2d 141, 146 (9th Cir.1973); *Union Oil Co. v. Morton*, 512 F.2d 743, 747-49 (9th Cir.1975).

The court agrees with plaintiffs that the reasons given for the suspensions were not the type contemplated by the OCSLA, and thus were neither agreed upon by plaintiffs nor incorporated into the bargain at the time of contract formation. The suspension notices state that the leases were suspended in order to comply with the OBPA. The

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[13] 30 C.F.R. § 250.10(b) provides:

> . . . suspension of any operation or activity, including production, because of the following:
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> * * * * * *
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> (4) The suspension is necessary for the implementation of the requirements of the National Environmental Policy Act or to conduct an environmental analysis;

OCSLA, however, already provided a detailed and comprehensive framework of regulatory procedures for the OCS oil and gas leasing program. The OCSLA provides that if the SOI determines that exploration plans were consistent with the OCSLA's environmental guidelines, he "shall approve" them. If not, i.e., if the plans are likely to cause serious injury to life, property, or the environment, then he shall reject them. 43 U.S.C. § 1340(c)(1). The OCSLA provides a coherent scheme for the OCS program, and it was that scheme only around which the parties formed their contracts. In signing the leases, plaintiffs agreed to subject themselves to the OCSLA and the regulatory scheme surrounding it, but they could not have envisioned themselves being bound by the OBPA. Plaintiffs were aware that only in certain circumstances (for example, in case of a threat of serious harm)[14] could their leases be suspended or cancelled. Indeed, in certain instances plaintiffs themselves might have requested such action. What they did not agree to, however, was that the leases could be unilaterally suspended indefinitely through a mechanism beyond the scope of the OCSLA.

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[14] The regulations prescribed by the Secretary under this subsection shall include, but not be limited to, provisions—

> (1) for the suspension or temporary prohibition of any operation or activity, including production, pursuant to any lease or permit (A) at the request of a lessee, in the national interest, to facilitate proper development of a lease or to allow for the construction or negotiation for use of transportation facilities, or (B) *if there is a threat of serious, irreparable, or immediate harm or damage* to life (including fish and other aquatic life), to property, to any mineral deposits (in areas leased or not leased), or to the marine, coastal, or human environment, and for the extension of any permit or lease affected by suspension or prohibition under clause (A) or (B) by a period equivalent to the period of such suspension or prohibition . . .

43 U.S.C. § 1334(a) (emphasis added).

The parties did not contemplate at the time of formation that the leases could be suspended because, some nine years later, Congress would want to promote new policies on enhanced environmental protection by, among other actions, halting development of the OCS offshore North Carolina. This was within neither the words nor the spirit of the lease agreements. Thus, the court finds that defendant's actions are not justified as mere lawful, authorized suspensions of the leases but material breaches of the lease contracts.

Further evidence that the suspensions were not the type bargained for in the leases is the duration of the suspensions. Section 250.10(e) provides that the suspensions should not exceed five years. Except under limited circumstances, OCSLA establishes that leases must be suspended for five years before they may be cancelled. That the OCSLA provides a mechanism to cancel leases after a prolonged suspension period demonstrates that it only intended suspension be of a limited duration. Significantly, many of the suspension notices directed plaintiffs to this section of the OCSLA stating that the leases must be suspended for a period of five years before cancellation. The OCSLA contemplated that suspensions would be of a limited nature and not indefinite bars to exploration. The court in *Union Oil*, construing similar OCS leases, likewise found that a suspension "by definition possesses a 'temporary nature.'" 512 F.2d at 750. Continuing, that court acknowledged the SOI's broad suspension powers for conservation of natural resources but found, "Congress clearly did not intend to grant leases so tenuous in nature that the Secretary could terminate them, in whole or in part, at will." *Id.*

Defendant's counsel admitted during oral arguments that defendant has no idea how long these suspensions

will continue, that there is no evidence that the suspensions will be lifted anytime in the future, and that the United States is not waiting for the completion of any studies or the results of any tests or any additional information before acting on the suspensions. The suspension in *Gulf Oil* thus differs from those in the case at bar because the latter were not prompted by the SOI's imminent concerns about risks to the marine ecosystem. *See* 493 F.2d at 144-45. It seems clear that the leases neither provide for nor even implicitly contemplate the type of open-ended, indefinite suspensions present in this case. The government's reliance on the Secretary's limited suspension powers to avoid breach of contract, therefore, is misguided and misplaced.

Plaintiffs have convinced the court that under the leases they were entitled to fair consideration of their POE's, the essential first step to exploitation of their leases. The court completely agrees with plaintiffs' interpretation of the leases that there can be no doubt that the lessor is contractually obligated to consider and act on POEs submitted by lessees regardless of the fact that the defendant's obligations are not stated definitively by express language in the leases. Again, as plaintiffs argue, an "interpretation of the leases that would allow the United States as lessor to fail to act on POEs, after requiring large up-front bonuses and lessor approval of POEs, would create an illusory bargain and permit unilateral forfeitures of lease bonuses, putting lessees entirely at the mercy of the United States." For all of the foregoing reasons, the court holds that defendant's failure, under the restrictions adopted pursuant to the OBPA, was a material breach of the leases. Accordingly, plaintiffs are entitled to a monetary recovery in his proceeding.

B. The Impact of Subsequent Legislation on a Government Contract Involving a Highly Regulated Industry

The U.S. Court of Appeals for the Federal Circuit has recently discussed the force and effect of subsequent legislation on the issue of breach of a government contract involving a highly regulated industry. In *Winstar Corp. v. United States,* 64 F.3d 1531 (Fed.Cir.1995), *cert. granted,* —— *U.S.* ——, 116 S.Ct. 806, 133 L.Ed.2d 753 (1996), the Federal Circuit confronted some of the same issues presented by the case at bar. Indeed, the parties to this case have taken advantage of every opportunity to bring to this court's attention the significance, or lack thereof, of the Federal Circuit's decision in *Winstar* to affirm this court's holding in that case. *See Pl.'s Motion for Leave to File Recent Appellate Opinion, Df.'s Response, Pl.'s Reply, Df.'s Report of the Effects of the Decision in Winstar,* and *Pl.'s Response to Df.'s Report.* In short, the Federal Circuit, sitting *en banc,* affirmed this court's decision that the government, by enacting the Financial Institution Reforms, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub.L. No. 101-73, 103 Stat. 183, as codified in relevant part by 12 U.S.C. § 1464 *et seq.,* breached its express and implied contracts with plaintiffs, the Winstar Corporation ("Winstar"), the Statesman Bank ("Statesman") and Glendale Federal Bank ("Glendale"). The Federal Circuit reasoned that where future or subsequent legislation contradicts the intent of the parties to a contract, the United States may be liable for breach under certain circumstances despite the sovereign acts doctrine. Clearly, *Winstar* is apposite. Therefore, the following, more detailed examination of the *Winstar* decision will help explain the resolution of this case.

Winstar presented a case in which financial institutions had formed express and implied contracts with the United

States in the highly regulated field of banking. Originally, the plaintiffs, Winstar, Statesman and Glendale, had consolidated their actions in the Court of Federal Claims. This court found that the government had breached its contracts with the plaintiffs by enacting subsequent legislation, the FIRREA. The contracts at issue allowed the financial institutions to take advantage of special accounting treatment in their acquisition of failing thrifts. Specifically, the contracts permitted the plaintiff financial institutions to calculate a special type of goodwill, an intangible asset representing the ability of a business or financial institution to generate income due to business reputation, market position, management, technology, and other elusive indications of earning power. In the savings and loan ("S & L") industry, "supervisory goodwill" represents the difference between the fair market values of a failing thrift's current assets and its liabilities assumed by the acquirer and is normally amortizable over a straight-line basis over a number of years. Under the contracts at issue:

> The Bank Board and the FSLIC [Federal Savings and Loan Insurance Corporation] allowed the merged thrifts to count this supervisory goodwill toward the minimum regulatory capital requirements and to amortize this goodwill over periods of up to 40 years. This permitted the healthy thrift to assume the deposit liabilities of the failing thrift and to have capital compliance without having to put up large amounts of its own money and without requiring large amounts of monetary assistance from the government.

Id. at 1536. In 1989, Congress responded to a financial crisis that had overcome the S & L industry by enacting the FIRREA, which significantly impacted the regulatory scheme of thrift mergers and acquisitions.

> As pertinent here, it (1) abolished the FSLIC and transferred its functions to other agencies; (2) created a new thrift deposit insurance fund under the Federal Deposit Insurance Corporation ("FDIC"); (3) eliminated the Bank Board and replaced it with the Office of Thrift Supervision ("OTS"), an office within the Department of the Treasury and made the OTS Director responsible for the regulation of all federally insured savings associations and the chartering of federal thrifts; and (4) established the Resolution Trust Corporation ("RTC"), which was charged with closing certain thrifts. *See* 12 U.S.C. §§ 1437 note, 1441a, 1821.

Id. at 1538. More significantly, the FIRREA "greatly reduced the amount of supervisory goodwill that could be used to meet regulatory capital requirements." *Id.* at 1544-45 (citing 12 U.S.C. § 1464(t)).

The plaintiffs filed suit in this court alleging that the government was liable for breach of contract and an unconstitutional taking without just compensation in violation of the Fifth Amendment by restricting the availability of supervisory goodwill and capital credits to satisfy the regulatory capital requirements of the plaintiffs as previously allowed prior to the enactment of the FIRREA. *Id.* at 1539. In its defense, the government argued that paintiffs did not have the contractual rights they alleged. More importantly, defendant, relying heavily on *Bowen v. Public Agencies Opposed to Social Security Entrapment ("POSSE")*, 477 U.S. 41, 106 S.Ct. 2390, 91 L.Ed.2d 35 (1986), challenged plaintiffs' claims by arguing that "the alleged agreements were subject to [subsequent] statutory and regulatory challenges." *Winstar*, 64 F.3d at 1539. *POSSE* states that " 'sovereign power, even when unexercised, is an enduring presence that governs all contracts

subject to the sovereign's jurisdiction, and will remain intact unless surrendered in unmistakable terms.' . . . Therefore, contractual arrangements, including those to which a sovereign itself is a party, 'remain subject to subsequent legislation.'" *POSSE*, 477 U.S. at 52, 106 S.Ct. at 2392 (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 147-48, 102 S.Ct. 894, 907, 71 L.Ed.2d 21 (1982)). In support of its position, the government cited a clause in the contract reading, "Nothing in this Agreement shall require any unlawful action or inaction by either of the parties hereto." *Winstar*, 64 F.3d at 1542. Defendant argued that the *Winstar* plaintiffs "impermissibly sought to enjoin Congress' power to legislate and the agencies' power to regulate."[15] *Id.* The Federal Circuit disposed of these arguments by reasoning that the government's *POSSE* arguments "'mischaracterized the plaintiffs' claim as one which improperly seeks to bind the government's power to regulate.' Rather, the [U.S. Court of Federal Claims] noted that plaintiffs sought only money damages, which did not implicate the government's power to regulate." *Id.* at 1545-46 (citing this court's decision with approval).

The breach of contract issues presented by the case at bar bear striking similarities to those addressed by the Federal Circuit in *Winstar*. Specifically, to what extent can the government be held liable for breach of contract when the alleged breach stems from subsequent legislation or regulation, which clashes with the terms of a public contract in a highly regulated industry or the objectively manifested intent of the parties thereto in a highly regu-

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15 The government also asserted the sovereign acts doctrine and the unmistakability doctrine as defenses, claiming that they precluded any recovery by plaintiffs for governmental breach of contract. *Winstar*, 64 F.3d at 1539. These doctrines are discussed *infra* at *III. Other Defenses.*

lated industry? Although the Federal Circuit in *Winstar* did not venture to set forth a precise test, it did consider factors that help clarify whether subsequent legislation may give rise to governmental liability for breach of contract. First, the parties' objective intent, to the extent it can be crystallized from the contract terms reduced to writing, is probative of the force and effect of subsequent laws. Second, the presence of an integration clause strongly suggests that the contract was the sole embodiment of the bargain. A non-integration clause, or a clause referring to terms not found in the contract document, therefore, is evidence that the agreement is subject to external conditions or requirements, whether statutory, regulatory, or otherwise. Third, if the contract on its face would subject one or more of the parties to "regulatory noncompliance and penalties" when read in light of the subsequent governmental action in question, it would defy reason to hold the agreement subject to such an outright restriction. Finally, the Federal Circuit reasoned that a prior agreement, when contradicted by subsequent legislation, does not constitute a mere statement of "then-current prosecutorial and regulatory policy" once the parties have become bound by specific terms through mutual assent. *Id.* at 1541-42.

In this case, the first of these considerations supports plaintiffs' position that the subsequent legislation here at issue, the OBPA, violates the North Carolina leases. The objective intent of the parties seems clear—plaintiffs paid the oil and gas lease bonuses and rental payments in consideration for at least the opportunity to explore and develop the OCS. As plaintiffs point out, no one would pay such an exorbitant premium for interests that could potentially be rendered worthless, and that is in effect what the OBPA accomplishes by prohibiting the approval of any exploration, development, or production plans, nor

any application for permit to drill until the later of October 1, 1991, or 45 days of continuous Congressional session following "submission of a written report to the Congress by the Secretary of the Interior, made after consideration of the findings and recommendations of the Environmental Sciences Review Panel." 33 U.S.C. § 2753 (c)(1). To the extent the parties' intent sheds light on the applicability of subsequent legislation, it is most doubtful that they intended that the North Carolina leases be governed by future or subsequent legislation such as the OBPA, which was enacted approximately seven years after the last disputed contract was formed.

The second *Winstar* consideration, the inclusion and scope of an integration or non-integration clause, may shed light in the case at bar on whether the disputed bargain was struck subject to future or subsequent legislation. *See* 64 F.3d at 1541. On the one hand, the North Carolina lease agreements contain a provision in Sec. 1, which reads that the lease agreements were issued pursuant to the OCSLA of August 7, 1953, and subject to: "[that] Act; all regulations issued pursuant to the statute and in existence upon the Effective Date of this lease; all regulations issued pursuant to the statute *in the future* . . . and all other applicable statutes and regulations." SXs 128-180, Sec. 2 (emphasis added). This provision may not be read as an integration or nonintegration clause, but rather as a provision incorporating other terms by reference. This, however, does not necessarily mean that the contracts are subject to *all* subsequent statutes and regulations. Legislative acts that lie beyond the scope of this clause still may not alter, vary, or contradict the terms of the North Carolina lease agreements. The key to the linchpin, then, is to determine which legislative acts fall within the scope of Sec. 1. Through contract interpretation, this court has determined that future, subsequent statutes were not contemplated by the North Carolina lease agreements, much less statutes that suspended the leases through means beyond the scope of Sec. 13 of the contracts. Had the parties intended this to be the case, the government could have made this clear in drafting Sec. 1 of the leases. Despite the government's claims that the OBPA has retroactive effect, plaintiffs, in performing under the contracts at issue, were not "contractually bound" to comply with the OBPA. *See* 64 F.3d at 1541. Ultimately, while the second *Winstar* consideration is somewhat illuminative on the issue of breach, it does not provide conclusive support for either parties' motion.

The third consideration discussed in *Winstar* deals with regulatory noncompliance and penalties. That is, if a party to a contract would be subject to penalties for regulatory noncompliance but for the availability of certain special treatment accorded by the contract, then it is probable that subsequent legislation that eliminates such exceptional treatment is ineffective against those contractually bound parties. 64 F.3d at 1542. In this case, plaintiffs faced no such risk, except to the extent that any party attempting to explore and develop oil and gas resources on the OCS without a valid permit would be subject to applicable regulatory sanctions. As in *Winstar*, plaintiffs in the present case acquired their unique busines opportunities solely as a result of contract formation. In both cases, subsequent legislation sought to deprive plaintiffs of a substantial portion of those opportunities. In this case, the legislation was narrowly tailored to target the specific contracts and sought to abate the accompanying rights here at issue.

Finally, the Federal Circuit in *Winstar* considered whether rights vested through contract formation can be

overridden by future or subsequent legislation or regulation when the understood terms of the agreement amount to no more than a manifestation of "then-current prosecutorial and regulatory policy." *Winstar*, 64 F.3d at 1542. That court reasoned that the government's argument that contract terms bestowing special treatment upon parties may be disregarded as a mere statement of policy was of no moment.

> Once specific terms as to the [contract terms] were incorporated in a negotiated arm's length contract, both parties were bound to them. While it is true as the government argues that a statement of policy . . . could be changed (which it later was), the contract could not be changed except by mutual consent.

Id. In the case at bar, the government does not go so far as to say that the provisions of the OCSLA were mere statements of environmental regulatory policy. Defendant does, however, suggest that where the two acts conflict, enactment of the OBPA supplants the OCSLA and, accordingly, controls the North Carolina leases thereafter. Thus, defendant argues that this court should grant its motion for summary judgment. Defendant's argument is without merit. In fact, granting defendant's motion would deprive both parties of the benefits of their bargain. This court finds that the government's implication that changing policies on environmental regulation, such as the OBPA, can subvert the parties' mutual assent, reduced to writing and memorialized in contract, rings hollow. "When performance of a duty under a contract is due any non-performance is a breach." RESTATEMENT (SECOND) OF CONTRACTS § 235(b) (1981), *cited inter alia by Winstar*, 64 F.3d at 1545. This court finds that defendant breached the North Carolina lease agreements by enacting the OBPA and subsequently implementing its

provisions in derogation of plaintiffs' rights under those agreements.

III. *Other Defenses*

As a defense to plaintiffs' claims of breach of contract, the government contends that the sovereign acts doctrine shields it from liability. It is a well-settled point of law that the sovereign acts defense is included as an inherent term, whether express or implied, in every public contract. *Hughes Communic. Galaxy, Inc. v. United States*, 998 F.2d 953, 958 (Fed.Cir.1993). The sovereign acts doctrine has its genesis in the proposition that the government acts in a dual capacity—as both a contractor and a sovereign—and should not be held liable in contract for acts it performs as a sovereign. *See Jones v. United States*, 1 Ct.Cl. 383, 384-85, 1865 WL 1976 (1865); *Deming v. United States*, 1 Ct.Cl. 190, 191, 1865 WL 2004 (1865). This is necessary to allow the government to function properly unimpaired. The government, when acting as sovereign for the public welfare, cannot be expected to know, consider, or be held accountable for all of the many contracts it enters into as a contractor for the public welfare. *See Jones*, 1 Ct.Cl. at 384-85. The sovereign acts doctrine, however, is not intended to shield all government actions from liability for breach of contract. If all government actions qualified as sovereign acts, the government would be able to abrogate all of its public contracts without risk of liability for damages. *See United States v. Bostwick*, 94 U.S. 53, 68-69, 24 L.Ed. 65, (1876) (reviewing the decision of the Court of Claims and reasoning that the government contractually assumes responsibility for government acts that contravene its contractual obligations). The distinction between the two types of governmental actions, i.e., government *qua* sovereign versus government *qua* contractor, turns

on the nature of the actions involved. *Hughes Communic. Galaxy,* 998 F.2d at 958-59 & n. 8.

In order for defendant to assert successfully the sovereign acts doctrine as a defense, the government must demonstrate that the alleged breach constituted an act by the sovereign that was "public and general in nature," not private and contractual. *Horowitz v. United States,* 267 U.S. 458, 460-61, 45 S.Ct. 344, 344-45, 69 L.Ed. 736 (1925); *Orlando Helicopter Airways, Inc. v. Widnall,* 51 F.3d 258, 262 (Fed.Cir.1995) (stating that "[t]he focus of the inquiry is thus the nature of the conduct, not the identity of the government agent responsible."). In *Sun Oil Co. v. United States,* 215 Ct.Cl. 716, 572 F.2d 786 (1978), this court's predecessor determined that the SOI's denials of offshore oil permits did not merit sovereign acts immunity since they "were not actions of public and general applicability, but were actions directed principally and primarily at plaintiffs' contractual right[s]." *Id.* at 768, 572 F.2d at 817. Indeed, governmental acts that directly or intentionally, as opposed to incidentally, impede specific contracts rather than promote the public interest are not sovereign acts within the meaning of this defense. *A fortiori,* a governmental act whose effect was specifically designed to obstruct performance is not a sovereign act. *See* CIBINIC & NASH, ADMINSTRATION 367-70 (3d ed. 1995). Perhaps most importantly, the Federal Circuit has recently drawn a fine distinction between those cases in which the sovereign acts doctrine is material and those in which it is not. While "contractual arrangements, including those to which a sovereign itself is a party, 'remain subject to subsequent legislation' by the sovereign," the Federal Circuit agreed with this court in regarding *POSSE* as being inapposite in cases where the sovereign's power to legislate was not at issue and where the plaintiffs sought only damages

rather than to bind the sovereign's legislative or regulatory powers. *Winstar,* 64 F.3d at 1545-46 (quoting *POSSE,* 477 U.S. at 52, 106 S.Ct. at 2392). As applied here, plaintiffs do not contend that the government is without legislative power as a sovereign to prohibit lease exploration, but only that its decision to do so through the OBPA gives rise to liability for damages for breach of contract.

The unmistakability doctrine, a corollary to the sovereign acts doctrine, states that the government never surrenders its legislative or regulatory powers unless the legislation authorizing the government to enter into the contracts at issue states otherwise in unmistakable terms. Put another way, the United States may avoid liability for breach of contract for acts it undertakes as a sovereign unless it explicitly agrees to be contractually bound in unmistakable terms. *Hughes Communic.,* 998 F.2d at 958; *see also POSSE,* 477 U.S. at 52, 106 S.Ct. at 2392; *Transohio Sav. Bank v. Director, OTS,* 967 F.2d 598, 618-19 (D.C.Cir.1992). The unmistakability doctrine stands or falls with the sovereign acts doctrine. *Resolution Trust Corp. v. FSLIC,* 34 F.3d 982, 984 (10thCir. 1994). In the case at bar, the government's disputed act flows from enactment of the OBPA. Defendant argues that the OBPA is a public and general act of the government in its capacity as a lawmaker and, therefore, constitutes a sovereign act. According to defendant, the government was acting in its sovereign capacity to safeguard the environment. In support of this argument, defendant points to the structure of the OCS leasing program. According to defendant, the government, in leasing the OCS, was acting in both its sovereign and proprietary capacities because the OCS leases were specifically subject to the SOI's regulatory authority to preserve the natural resources of the OCS. Defendant thus suggests that laws affecting the environment are sovereign acts, public

and general in nature, and that the government never surrendered its sovereign powers or immunity.

It is true that under the OCSLA the Secretary may promulgate regulations to protect the environment and that plaintiffs' leases are subject to those regulations. It is not true, however, that all of the government's actions taken to protect the environment are sovereign acts. The notion that an agency official could simply, through regulation, declare plaintiffs' leases null and void and avoid contract liability by citing environmental concerns was squarely rejected by this court in *Everett Plywood Corp. v. United States*, 227 Ct.Cl. 415, 651 F.2d 723 (1981). In that case, the plaintiff was the successful bidder on a contract with the National Forest Service for the sale of timber. Because of environmental concerns, the government terminated the timber contracts. This court rejected the government's argument that it was acting as a sovereign. 227 Ct.Cl. at 422, 651 F.2d at 728. Similarly, in *Sun Oil Co. v. United States*, 215 Ct.Cl. 716, 572 F.2d 786, (1978), this court rejected the argument that merely expressing a desire to protect the environment turns an action into a "sovereign act." *Sun Oil* involved an OCS lease, similar to the ones at issue, that was also subject to the SOI's environmental regulations. The court, however, rejected the government's argument that the Secretary's denial of a permit to install an oil platform based on environmental considerations was a sovereign act. 215 Ct.Cl. at 768, 572 F.2d at 817. While the government has broad powers to regulate the environment, its actions are not necessarily sovereign acts merely because they are done in the name of environmental protection.

While the OBPA may have been the result of developing environmental concerns, it was not an act of public, general applicability. Further, the OBPA affected the public welfare incidentally at most. That act was "principally and primarily" enacted to restrict the SOI's ability to act on plaintiffs' POEs, thus binding his hands. The OBPA specifically targeted plaintiffs and prevented them from exercising their lease rights. It was specifically enacted to delay indefinitely plaintiffs' exploration of the OCS offshore North Carolina. *See Freedman v. United States*, 162 Ct.Cl. 390, 402, 320 F.2d 359, 366 (1963) ("The doctrine . . . does not relieve the government from liability where it has specially undertaken to perform the very act from which it later seeks to be excused"). As previously explained, plaintiffs in this case do not challenge the government's authority to enact the OBPA. They ask only for the benefit of their bargain or at least to be made whole by recovering the damages resulting from the enactment and enforcement of the OBPA. As in *Winstar*, this court concludes that the United States' sovereign power is not at issue in this case. The OBPA does not constitute a sovereign act. "The terms of a government contract, like any other contract, do not change with the enactment of subsequent legislation absent a specific contractual provision providing for such a change." *Winstar*, 64 F.2d at 1547. The sovereign acts doctrine is no bar to plaintiffs' claims for damages for breach of contract. After carefully considering defendant's arguments, the court finds that neither the sovereign acts doctrine nor the unmistakability doctrine shields defendant from the liability the United States would otherwise bear for breach of contract. Thus, the court holds that as a result of the OBPA, defendant breached the North Carolina leases through its unilateral actions in suspending plaintiffs' leases, resulting in its failure to give plaintiffs' POEs full and fair consideration.

IV. *Fifth Amendment Taking Claims*

The Fifth Amendment prohibits the government from taking an interest in private property "for public use with-

out just compensation." This clause is not a grant of power, but rather, a limitation on the exercise of power. Plaintiffs have stated no taking claim as to the North Carolina lease interests in their cross-motions for partial summary judgment. They have, however, failed to respond to defendant's motion for summary judgment on the taking issue. Defendant, citing *Southern Nev. Shell Dealers Assoc. v. Shell Oil Co.*, 725 F.Supp. 1104, 1109 (D.Nev.1989), argues that its motion, therefore, is unopposed and must be granted. RCFC 56(f), which conforms to the corresponding Federal Rule of Civil Procedure ("FRCP") 56(e), states:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of such party's pleading, but such party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If such party does not so respond, summary judgment, *if appropriate*, shall be entered against such party.

(Emphasis added.) *See also Sweats Fashions, Inc.*, 833 F.2d at 1562, 1565. Given the fact-intensive nature of a takings analysis and the evidence currently before the court, the government has not convinced this court that there are no material issues of fact rendering judgment as a matter of law appropriate. Accordingly, summary judgment on the taking issue cannot be granted at this phase of litigation.

CONCLUSION

After careful consideration of the oral testimony, exhibits, arguments, and the applicable law, the court denies defendant's motion for summary judgment and grants third-party plaintiffs' cross-motion for partial summary judgment on the breach of contract claims. The court denies defendant's motion for summary judgment on the Fifth Amendment taking issue.

With respect to the amount of damages to which the remaining plaintiffs may be entitled for breach of contract, the court will hold a formal status conference to discuss with the parties a schedule for resolution of the issue of the quantification of damages to be awarded.

IT IS SO ORDERED.

APPENDIX E

43 U.S.C. § 1331. Definitions

When used in this subchapter—

(a) The term "outer Continental Shelf" means all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control;

(b) The term "Secretary" means the Secretary of the Interior, except that with respect to functions under this subchapter transferred to, or vested in, the Secretary of Energy or the Federal Energy Regulatory Commission by or pursuant to the Department of Energy Organization Act (42 U.S.C. 7101 et seq.), the term "Secretary" means the Secretary of Energy, or the Federal Energy Regulatory Commission, as the case may be;

(c) The term "lease" means any form of authorization which is issued under section 1337 of this title or maintained under section 1335 of this title and which authorizes exploration for, and development and production of, minerals;

(d) The term "person" includes, in addition to a natural person, an association, a State, a political subdivision of a State, or a private, public, or municipal corporation;

(e) The term "coastal zone" means the coastal waters (including the lands therein and thereunder) and the adjacent shorelands (including the waters therein and thereunder), strongly influenced by each other and in proximity to the shorelines of the several coastal States, and includes islands, transition and intertidal areas, salt marshes, wetlands, and beaches, which zone extends seaward to the outer limit of the United States territorial sea and extends inland from the shorelines to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters, and the inward boundaries of which may be identified by the several coastal States, pursuant to the authority of section 1454(b)(1) of title 16;

(f) The term "affected State" means, with respect to any program, plan, lease sale, or other activity, proposed, conducted, or approved pursuant to the provisions of this Act, any State—

(1) the laws of which are declared, pursuant to section 1333(a)(2) of this title, to be the law of the United States for the portion of the outer Continental Shelf on which such activity is, or is proposed to be, conducted;

(2) which is, or is proposed to be, directly connected by transportation facilities to any artificial island or structure referred to in section 1333(a)(1) of this title;

(3) which is receiving, or in accordnace [sic] with the proposed activity will receive, oil for processing, refining, or transshipment which was extracted from the outer Continental Shelf and transported directly to such State by means of vessels or by a combination of means including vessels;

(4) which is designated by the Secretary as a State in which there is a substantial probability of significant impact on or damage to the

coastal, marine, or human environment, or a State in which there will be significant changes in the social, governmental, or economic infrastructure, resulting from the exploration, development, and production of oil and gas anywhere on the outer Continental Shelf; or

(5) in which the Secretary finds that because of such activity there is, or will be, a significant risk of serious damage, due to factors such as prevailing winds and currents, to the marine or coastal environment in the event of any oilspill, blowout, or release of oil or gas from vessels, pipelines, or other transshipment facilities.

(g) The term "marine environment" means the physical, atmospheric, and biological components, conditions, and factors which interactively determine the productivity, state, condition, and quality of the marine ecosystem, including the waters of the high seas, the contiguous zone, transitional and intertidal areas, salt marshes, and wetlands within the coastal zone and on the outer Continental Shelf;

(h) The term "coastal environment" means the physical atmospheric, and biological components, conditions, and factors which interactively determine the productivity, state, condition, and quality of the terrestrial ecosystem from the shoreline inward to the boundaries of the coastal zone;

(i) The term "human environment" means the physical, social, and economic components, conditions, and factors which interactively determine the state, condition, and quality of living conditions, employment, and health of those affected, directly or indirectly, by activities occurring on the outer Continental Shelf;

(j) The term "Governor" means the Governor of a State, or the person or entity designated by, or pursuant to, State law to exercise the powers granted to such Governor pursuant to this subchapter;

(k) The term "exploration" means the process of searching for minerals, including (1) geophysical surveys where magnetic, gravity, seismic, or other systems are used to detect or imply the presence of such minerals, and (2) any drilling, whether on or off known geological structures, including the drilling of a well in which a discovery of oil or natural gas in paying quantities is made and the drilling of any additional delineation well after such discovery which is needed to delineate any reservoir and to enable the lessee to determine whether to proceed with development and production;

(l) The term "development" means those activities which take place following discovery of minerals in paying quanties, including geophysical activity, drilling, platform construction, and operation of all onshore support facilities, and which are for the purpose of ultimately producing the minerals discovered;

(m) The term "production" means those activities which take place after the successful completion of any means for the removal of minerals, including such removal, field operations, transfer of minerals to shore, operation monitoring, maintenance, and work-over drilling;

(n) The term "antitrust law" means—

(1) the Sherman Act (15 U.S.C. 1 et seq.);

(2) the Clayton Act (15 U.S.C. 12 et seq.);

(3) the Federal Trade Commission Act (15 U.S.C. 41 et seq.);

(4) the Wilson Tariff Act (15 U.S.C. 8 et seq.); or

(5) the Act of June 19, 1936, chapter 592 (15 U.S.C. 13, 13a, 13b, and 21a);

(o) The term "fair market value" means the value of any mineral (1) computed at a unit price equivalent to the average unit price at which such mineral was sold pursuant to a lease during the period for which any royalty or net profit share is accrued or reserved to the United States pursuant to such lease, or (2) if there were no such sales, or if the Secretary finds that there were an insufficient number of such sales to equitably determine such value, computed at the average unit price at which such mineral was sold pursuant to other leases in the same region of the outer Continental Shelf during such period, or (3) if there were no sales of such mineral from such region during such period, or if the Secretary finds that there are an insufficient number of such sales to equitably determine such value, at an appropriate price determined by the Secretary;

(p) The term "major Federal action" means any action or proposal by the Secretary which is subject to the provisions of section 4332(2)(C) of title 42; and

(q) The term "minerals" includes oil, gas, sulphur, geopressured-geothermal and associated resources, and all other minerals which are authorized by an Act of Congress to be produced from "public lands" as defined in section 1702 of this title.

(Aug. 7, 1953, ch 345, § 2; 67 Stat. 462; Sept. 18, 1978, Pub. L. 95-372, title II, § 201, 92 Stat. 632.)

43 U.S.C. § 1332. Congressional declaration of policy

It is hereby declared to be the policy of the United States that—

(1) the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter;

(2) this subchapter shall be construed in such a manner that the character of the waters above the outer Continental Shelf as high seas and the right to navigation and fishing therein shall not be affected;

(3) the outer Continental Shelf is a vital national resource reserve held by the Federal Government for the public, which should be made available for expeditious and orderly development, subject to environmental safeguards, in a manner which is consistent with the maintenance of competition and other national needs;

(4) since exploration, development, and production of the minerals of the outer Continental Shelf will have significant impacts on coastal and non-coastal areas of the coastal States, and on other affected States, and, in recognition of the national interest in the effective management of the marine, coastal, and human environments—

(A) such States and their affected local governments may require assistance in protecting their coastal zones and other affected areas from any temporary or permanent adverse effects of such impacts;

(B) the distribution of a portion of the receipts from the leasing of mineral resources of the

outer Continental Shelf adjacent to State lands, as provided under section 1337(g) of this title, will provide affected coastal States and localities with funds which may be used for the mitigation of adverse economic and environmental effects related to the development of such resources; and

(C) such States, and through such States, affected local governments, are entitled to an opportunity to participate, to the extent consistent with the national interest, in the policy and planning decisions made by the Federal Government relating to exploration for, and development and production of, minerals of the outer Continental Shelf.

(5) the rights and responsibilities of all States and, where appropriate, local governments, to preserve and protect their marine, human, and coastal environments through such means as regulation of land, air, and water uses, of safety, and of related development and activity should be considered and recognized; and

(6) operations in the outer Continental Shelf should be conducted in a safe manner by well-trained personnel using technology, precautions, and techniques sufficient to prevent or minimize the likelihood of blowouts, loss of well control, fires, spillages, physical obstruction to other users of the waters or subsoil and seabed, or other occurrences which may cause damage to the environment or to property, or endanger life or health.

(Aug. 7, 1953, ch 345, § 3, 67 Stat. 462; Sept. 18, 1978, Pub. L. 95-372, title II, § 202, 92 Stat. 634; Apr. 7, 1986, Pub. L. 99-272, title VIII, § 8002, 100 Stat. 148.)

43 U.S.C. § 1333. Laws and regulations governing lands

(a) Constitution and United States laws; laws of adjacent States; publication of projected State lines; international boundary disputes; restriction on State taxation and jurisdiction

(1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however*, That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

(2)(A) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental

Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

(B) Within one year after September 18, 1978, the President shall establish procedures for setting [sic] any outstanding international boundary dispute respecting the outer Continental Shelf.

(3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

(b) Longshore and Harbor Workers' Compensation Act applicable; definitions

With respect to disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf, compensation shall be payable under the provisions of the Longshore and Harbor Workers' Compensation Act [33 U.S.C. 901 et seq.]. For the purposes of the extension of the provisions of the Longshore and Harbor Workers' Compensation Act under this section—

(1) the term "employee" does not include a master or member of a crew of any vessel, or an officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof;

(2) the term "employer" means an employer any of whose employees are employed in such operations;

(3) the term "United States" when used in a geographical sense includes the outer Continental Shelf and artificial islands and fixed structures thereon.

(c) National Labor Relations Act applicable

For the purposes of the National Labor Relations Act, as amended [29 U.S.C. 151 et seq.], any unfair labor practice, as defined in such Act, occurring upon any artificial island, installation, or other device referred to in subsection (a) of this section shall be deemed to have occurred within the judicial district of the State, the laws of which apply to such artificial island, installation, or other device pursuant to such subsection, except that until the President determines the areas within which such State laws are applicable, the judicial district shall be that of the State nearest the place of location of such artificial island, installation, or other device.

(d) Coast Guard regulations; marking of artificial islands, installations, and other devices; failure of owner suitably to mark according to regulations

(1) The Secretary of the Department in which the Coast Guard is operating shall have authority to promulgate and enforce such reasonable regulations with respect to lights and other warning devices, safety equipment, and other matters relating to the promotion of safety of life and property on the artificial islands, installations, and other devices re-

ferred to in subsection (a) of this section or on the waters adjacent thereto, as he may deem necessary.

(2) The Secretary of the Department in which the Coast Guard is operating may mark for the protection of navigation any artificial island, installation, or other device referred to in subsection (a) of this section whenever the owner has failed suitably to mark such island, installation, or other device in accordance with regulations issued under this subchapter, and the owner shall pay the cost of such marking.

(e) Authority of Secretary of the Army to prevent obstruction to navigation

The authority of the Secretary of the Army to prevent obstruction to navigation in the navigable waters of the United States is extended to the artificial islands, installations, and other devices referred to in subsection (a) of this section.

(f) Provisions as nonexclusive

The specific application by this section of certain provisions of law to the subsoil and seabed of the outer Continental Shelf and the artificial islands, installations, and other devices referred to in subsection (a) of this section or to acts or offenses occurring or committed thereon shall not give rise to any inference that the application to such islands and structures, acts, or offenses of any other provision of law is not intended.

(Aug. 7, 1953, ch 345, § 4, 67 Stat. 462; Jan. 3, 1975, Pub. L. 93-627, § 19(f), 88 Stat. 2146; Sept. 18, 1978, Pub. L. 95-372, title II, § 203, 92 Stat. 635; Sept. 28, 1984, Pub. L. 98-426, § 27(d)(2), 98 Stat. 1654.

43 U.S.C. § 1334. Administration of leasing

(a) Rules and regulations; amendment; cooperation with State agencies; subject matter and scope of regulations

The Secretary shall administer the provisions of this subchapter relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions. The Secretary may at any time prescribe and amend such rules and regulations as he determines to be necessary and proper in order to provide for the prevention of waste and conservation of the natural resources of the outer Continental Shelf, and the protection of correlative rights therein, and, notwithstanding any other provisions herein, such rules and regulations shall, as of their effective date, apply to all operations conducted under a lease issued or maintained under the provisions of this subchapter. In the enforcement of safety, environmental, and conservation laws and regulations, the Secretary shall cooperate with the relevant departments and agencies of the Federal Government and of the affected States. In the formulation and promulgation of regulations, the Secretary shall request and give due consideration to the views of the Attorney General with respect of matters which may affect competition. In considering any regulations and in preparing any such views, the Attorney General shall consult with the Federal Trade Commission. The regulations prescribed by the Secretary under this subsection shall include, but not be limited to, provisions—

(1) for the suspension or temporary prohibition of any operation or activity, including production, pursuant to any lease or permit (A) at the request of a lessee, in the national interest, to facilitate proper development of a lease or to allow for the construction or negotiation for use of transportation facili-

ties, or (B) if there is a threat of serious, irreparable, or immediate harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits (in areas leased or not leased), or to the marine, coastal, or human environment, and for the extension of any permit or lease affected by suspension or prohibition under clause (A) or (B) by a period equivalent to the period of such suspension or prohibition, except that no permit or lease shall be so extended when such suspension or prohibition is the result of gross negligence or willful violation of such lease or permit, or of regulations issued with respect to such lease or permit;

(2) with respect to cancellation of any lease or permit—

(A) that such cancellation may occur at any time, if the Secretary determines, after a hearing, that—

(i) continued activity pursuant to such lease or permit would probably cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral (in areas leased or not leased), to the national security or defense, or to the marine, coastal, or human environment;

(ii) the threat of harm or damage will not disappear or decrease to an acceptable extent within a reasonable period of time; and

(iii) the adavntages of cancellation outweigh the advantages of continuing such lease or permit force;

(B) that such cancellation shall not occur unless and until operations under such lease or

permit shall have been under suspension, or temporary prohibition, by the Secretary, with due extension of any lease or permit term continuously for a period of five years, or for a lesser period upon request of the lessee;

(C) that such cancellation shall entitle the lessee to receive such compensation as he shows to the Secretary as being equal to the lesser of (i) the fair value of the canceled rights as of the date of cancellation, taking account of both anticipated revenues from the lease and anticipated costs, including costs of compliance with all applicable regulations and operating orders, liability for cleanup costs or damages, or both, in the case of an oilspill, and all other costs reasonably anticipated on the lease, or (ii) the excess, if any, over the lessee's revenues, from the lease (plus interest thereon from the date of receipt to date of reimbursement) of all consideration paid for the lease and all direct expenditures made by the lessee after the date of issuance of such lease and in connection with exploration or development, or both, pursuant to the lease (plus interest on such consideration and such expenditures from date of payment to date of reimbursement), except that (I) with respect to leases issued before September 18, 1978, such compensation shall be equal to the amount specified in clause (i) of this subparagraph; and (II) in the case of joint leases which are canceled due to the failure of one or more partners to exercise due diligence, the innocent parties shall have the right to seek damages for such loss from the responsible party or parties and the right to acquire the interests of the

negligent party or parties and be issued the lease in question;

(3) for the assignment or relinquishment of a lease;

(4) for unitization, pooling, and drilling agreements;

(5) for the subsurface storage of oil and gas other than by the Federal Government;

(6) for drilling or easements necessary for exploration, development, and production;

(7) for the prompt and efficient exploration and development of a lease area; and

(8) for compliance with the national ambient air quality standards pursuant to the Clean Air Act (42 U.S.C. 7401 et seq.), to the extent that activities authorized under this subchapter significantly affect the air quality of any State.

(b) Compliance with regulations as conditions for issuance, continuation, assignment, or other transfer of leases

The issuance and continuance in effect of any lease, or of any assignment or other transfer of any lease, under the provisions of this subchapter shall be conditioned upon compliance with regulations issued under this subchapter.

(c) Cancellation of nonproducing lease

Whenever the owner of a nonproducing lease fails to comply with any of the provisions of this subchapter, or of the lease, or of the regulations issued under this subchapter, such lease may be canceled by the Secretary, subject to the right of judicial review as provided in this subchapter, if such default continues for the period of thirty days after mailing of notice by registered letter to the lease owner at his record post office address.

(d) Cancellation of producing lease

Whenever the owner of any producing lease fails to comply with any of the provisions of this subchapter, of the lease, or of the regulations issued under this subchapter, such lease may be forfeited and canceled by an appropriate proceeding in any United States district court having jurisdiction under the provisions of this subchapter.

(e) Pipeline rights of way; forfeiture of grant

Rights-of-way through the submerged lands of the outer Continental Shelf, whether or not such lands are included in a lease maintained or issued pursuant to this subchapter, may be granted by the Secretary for pipeline purposes for the transportation of oil, natural gas, sulphur, or other minerals, or under such regulations and upon such conditions as may be prescribed by the Secretary, or where appropriate the Secretary of Transportation, including (as provided in section 1347(b) of this title) assuring maximum environmental protection by utilization of the best available and safest technologies, including the safest practices for pipeline burial and upon the express condition that oil or gas pipelines shall transport or purchase without discrimination, oil or natural gas produced from submerged lands or outer Continental Shelf lands in the vicinity of the pipelines in such proportionate amounts as the Federal Energy Regulatory Commission, in consultation with the Secretary of Energy, may, after a full hearing with due notice thereof to the interested parties, determine to be reasonable, taking into account, among other things, conservation and the prevention of waste. Failure to comply with the provisions of this section or the regulations and conditions prescribed under this section shall be grounds for forfeiture of the grant in an appropriate judicial proceeding instituted by the

United States in any United States district court having jurisdiction under the provisions of this subchapter.

(f) Competitive principles governing pipeline operation

(1) Except as provided in paragraph (2), every permit, license, easement, right-of-way, or other grant of authority for the transportation by pipeline on or across the outer Continental Shelf of oil or gas shall require that the pipeline be operated in accordance with the following competitive principles;

(A) The pipeline must provide open and nondiscriminatory access to both owner and nonowner shippers.

(B) Upon the specific request of one or more owner or nonowner shippers able to provide a guaranteed level of throughput, and on the condition that the shipper or shippers requesting such expansion shall be responsible for bearing their proportionate share of the costs and risks related thereto, the Federal Energy Regulatory Commission may, upon finding, after a full hearing with due notice thereof to the interested parties, that such expansion is within technological limits and economic feasibility, order a subsequent expansion of throughput capacity of any pipeline for which the permit, license, easement, right-of-way, or other grant of authority is approved or issued after September 18, 1978. This subparapraph [sic] shall not apply to any such grant of authority approved or issued for the Gulf of Mexico or the Santa Barbara Channel.

(2) The Federal Energy Regulatory Commission may, by order or regulation, exempt from any or all of the requirements of paragraph (1) of this subsection any pipeline or class of pipelines which feeds into a facility where oil and gas are first collected or a facility where oil and gas are first separated, dehydrated, or otherwise processed.

(3) The Secretary of Energy and the Federal Energy Regulatory Commission shall consult with and give due consideration to the views of the Attorney General on specific conditions to be included in any permit, license, easement, right-of-way, or grant of authority in order to ensure that pipelines are operated in accordance with the competitive principles set forth in paragraph (1) of this subsection. In preparing any such views, the Attorney General shall consult with the Federal Trade Commission.

(4) Nothing in this subsection shall be deemed to limit, abridge, or modify any authority of the United States under any other provision of law with respect to pipelines on or across the outer Continental Shelf.

(g) Rates of production

(1) The leasee [sic] shall produce any oil or gas, or both, obtained pursuant to an approved development and production plan, at rates consistent with any rule or order issued by the President in accordance with any provision of law.

(2) If no rule or order referred to in paragraph (1) has been issued, the lessee shall produce such oil or gas, or both, at rates consistent with any regulation promulgated by the Secretary of Energy which is to assure the maximum rate of production which may be sustained without loss of ultimate recovery of oil or gas, or both, under sound engineering and eco-

nomic principles, and which is safe for the duration of the activity covered by the approved plan. The Secretary may permit the lessee to vary such rates if he finds that such variance is necessary.

(h) Federal action affecting outer Continental Shelf; notification; recommended changes

The head of any Federal department or agency who takes any action which has a direct and significant effect on the outer Continental Shelf or its development shall promptly notify the Secretary of such action and the Secretary shall thereafter notify the Governor of any affected State and the Secretary may thereafter recommend such changes in such action as are considered appropriate.

(i) Flaring of natural gas

After September 18, 1978, no holder of any oil and gas lease issued or maintained pursuant to this subchapter shall be permitted to flare natural gas from any well unless the Secretary finds that there is no practicable way to complete production of such gas, or that such flaring is necessary to alleviate a temporary emergency situation or to conduct testing or work-over operations.

(j) Cooperative development of common hydrocarbon-bearing areas

(1) Findings

(A) The Congress of the United States finds that the unrestrained competitive production of hydrocarbons from a common hydrocarbon-bearing geological area underlying the Federal and State boundary may result in a number of harmful national effects, including—

(i) the drilling of unnecessary wells, the installation of unnecessary facilities and other imprudent operating practices that result in

economic waste, environmental damage, and damage to life and property;

(ii) the physical waste of hydrocarbons and an unnecessary reduction in the amounts of hydrocarbons that can be produced from certain hydrocarbon-bearing areas; and

(iii) the loss of correlative rights which can result in the reduced value of national hydrocarbon resources and disorders in the leasing of Federal and State resources.

(2) Prevention of harmful effects

The Secretary shall prevent, through the cooperative development of an area, the harmful effects of unrestrained competitive production of hydrocarbons from a common hydrocarbon-bearing area underlying the Federal and State boundary.

(Aug. 7, 1953, ch 345, § 5, 67 Stat. 464; Sept. 18, 1978, Pub. L. 95-372, title II, § 204, 92 Stat. 636; Aug. 18, 1990, Pub. L. 101-380, title VI, § 6004(a), 104 Stat. 558.)

43 U.S.C. § 1337. Grant of leases by Secretary

(a) Oil and gas leases; award to highest responsible qualified bidder; method of bidding; Congressional consideration of bidding system; notice, anual report to Congress

(1) The Secretary is authorized to grant to the highest responsible qualified bidder or bidders by competitive bidding, under regulations promulgated in advance, any oil and gas lease on submerged lands of the outer Continental Shelf which are not covered by leases meeting the requirements of subsection (a) of section 1335 of this title. Such regulations may

provide for the deposit of cash bids in an interest-bearing account until the Secretary announces his decision on whether to accept the bids, with the interest earned thereon to be paid to the Treasury as to bids that are accepted and to the unsuccessful bidders as to bids that are rejected. The bidding shall be by sealed bid and, at the discretion of the Secretary, on the basis of—

(A) cash bonus bid with a royalty at not less than 12½ per centum fixed by the Secretary in amount or value of the production saved, removed, or sold;

(B) variable royalty bid based on a per centum in amount or value of the production saved, removed, or sold, with either a fixed work commitment based on dollar amount for exploration or a fixed cash bonus as determined by the Secretary, or both;

(C) cash bonus bid, or work commitment bid based on a dollar amount for exploration with a fixed cash bonus, and a diminishing or sliding royalty based on such formulae as the Secretary shall determine as equitable to encourage continued production from the lease area as resources diminish, but not less than 12½ per centum at the beginning of the lease period in amount or value of the production saved, removed, or sold;

(D) cash bonus bid with a fixed share of the net profits of no less than 30 per centum to be derived from the production of oil and gas from the lease area;

(E) fixed cash bonus with the net profit share reserved as the bid variable;

(F) cash bonus bid with a royalty at no less than 12½ per centum fixed by the Secretary in amount or value of the production saved, removed, or sold and a fixed per centum share of net profits of no less than 30 per centum to be derived from the production of oil and gas from the lease area;

(G) work commitment bid based on a dollar amount for exploration with a fixed cash bonus and a fixed royalty in amount or value of the production saved, removed, or sold;

(H) cash bonus bid with royalty at no less than 12 and ½ per centum fixed by the Secretary in amount or value of production saved, removed, or sold, and with suspension of royalties for a period, volume, or value of production determined by the Secretary, which suspensions may vary based on the price of production from the lease; or

(I) subject to the requirements of paragraph (4) of this subsection, any modification of bidding systems authorized in subparagraphs (A) through (G), or any other systems of bid variables, terms, and conditions which the Secretary determines to be useful to accomplish the purposes and policies of this subchapter, except that no such bidding system or modification shall have more than one bid variable.

(2) The Secretary may, in his discretion, defer any part of the payment of the cash bonus, as authorized in paragraph (1) of this subsection, according to a schedule announced at the time of the announcement of the lease sale, but such payment shall be made in total no later than five years after the date of the lease sale.

(3)(A) The Secretary may, in order to promote increased production on the lease area, through direct, secondary, or tertiary recovery means, reduce or eliminate any royalty or net profit share set forth in the lease for such area.

(B) In the Western and Central Planning Areas of the Gulf of Mexico and the portion of the Eastern Planning Area of the Gulf of Mexico encompassing whole lease blocks lying west of 87 degrees, 30 minutes West longitude, the Secretary may, in order to—

(i) promote development or increased production on producing or non-producing leases; or

(ii) encourage production of marginal resources on producing or non-producing leases;

through primary, secondary, or tertiary recovery means, reduce or eliminate any royalty or net profit share set forth in the lease(s). With the lessee's consent, the Secretary may make other modifications to the royalty or net profit share terms of the lease in order to achieve these purposes.

(C)(i) Notwithstanding the provisions of this subchapter other than this subparagraph, with respect to any lease or unit in existence on November 28, 1995, meeting the requirements of this subparagraph, no royalty payments shall be due on new production, as defined in clause (iv) of this subparagraph, from any lease or unit located in water depths of 200 meters or greater in the Western and Central Planning Areas of the Gulf of Mexico, including that portion of the Eastern Planning Area of the Gulf of Mexico encompassing whole lease blocks lying west of 87 degrees, 30 minutes West longitude, until such volume of production as determined pursuant to clause (ii) has been produced by the lessee.

(ii) Upon submission of a complete application by the lessee, the Secretary shall determine within 180 days of such application whether new production from such lease or unit would be economic in the absence of the relief from the requirement to pay royalties provided for by clause (i) of this subparagraph. In making such determination, the Secretary shall consider the increased technological and financial risk of deep water development and all costs associated with exploring, developing, and producing from the lease. The lessee shall provide information required for a complete application to the Secretary prior to such determination. The Secretary shall clearly define the information required for a complete application under this section. Such application may be made on the basis of an individual lease or unit. If the Secretary determines that such new production would be economic in the absence of the relief for the requirement to pay royalties provided for by clause (i) of this subparagraph, the provisions of clause (i) shall not apply to such production. If the Secretary determines that such new production would not be economic in the absence of the relief from the requirement to pay

royalties provided for by clause (i), the Secretary must determine the volume of production from the lease or unit on which no royalties would be due in order to make such new production economically viable; except that for new production as defined in clause (iv)(I), in no case will that volume be less than 17.5 million barrels of oil equivalent in water depths of 200 to 400 meters, 52.5 million barrels of oil equivalent in 400-800 meters of water, and 87.5 million barrels of oil equivalent in water depths greater than 800 meters. Redetermination of the applicability of clause (i) shall be undertaken by the Secretary when requested by the lessee prior to the commencement of the new production and upon significant change in the factors upon which the original determination was made. The Secretary shall make such redetermination within 120 days of submission of a complete application. The Secretary may extend the time period for making any determination or redetermination under this clause for 30 days, or longer if agreed to by the applicant, if circumstances so warrant. The lessee shall be notified in writing of any determination or redetermination and the reasons for and assumptions used for such determination. Any determination or redetermination under this clause shall be a final agency action. The Secretary's determination or redetermination shall be judicially reviewable under section 10(a) of the Administrative Procedures Act (5

U.S.C. 702), only for actions filed within 30 days of the Secretary's determination or redetermination.

(iii) In the event that the Secretary fails to make the determination or redetermination called for in clause (ii) upon application by the lessee within the time period, together with any extension thereof, provided for by clause (ii), no royalty payments shall be due on new production as follows:

(I) For new production, as defined in clause (iv)(I) of this subparagraph, no royalty shall be due on such production according to the schedule of minimum volumes specified in clause (ii) of this subparagraph.

(II) For new production, as defined in clause (iv)(II) of this subparagraph, no royalty shall be due on such production for one year following the start of such production.

(iv) For purposes of this subparagraph, the term "new production" is—

(I) any production from a lease from which no royalties are due on production, other than test production, prior to November 28, 1995; or

(II) any production resulting from lease development activities pursuant to a Development Operations Coordination Document, or supplement thereto that would expand production

significantly beyond the level anticipated in the Development Operations Coordination Document, approved by the Secretary after November 28, 1995.

(v) During the production of volumes determined pursuant to clauses (ii) or (iii) of this subparagraph, in any year during which the arithmetic average of the closing prices on the New York Mercantile Exchange for light sweet crude oil exceeds $28.00 per barrel, any production of oil will be subject to royalties at the lease stipulated royalty rate. Any production subject to this clause shall be counted toward the production volume determined pursuant to clause (ii) or (iii). Estimated royalty payments will be made if such average of the closing prices for the previous year exceeds $28.00. After the end of the calendar year, when the new average price can be calculated, lessees will pay any royalties due, with interest but without penalty, or can apply for a refund, with interest, of any overpayment.

(vi) During the production of volumes determined pursuant to clause (ii) or (iii) of this subparagraph, in any year during which the arithmetic average of the closing prices on the New York Mercantile Exchange for natural gas exceeds $3.50 per million British thermal units, any production of natural gas will be subject to royalties at the lease stipulated royalty rate.

Any production subject to this clause shall be counted toward the production volume determined pursuant to clauses (ii) or (iii). Estimated royalty payments will be made if such average of the closing prices for the previous year exceeds $3.50. After the end of the calendar year, when the new average price can be calculated, lessees will pay any royalties due, with interest but without penalty, or can apply for a refund, with interest, of any overpayment.

(vii) The prices referred to in clauses (v) and (vi) of this subparagraph shall be changed during any calendar year after 1994 by the percentage, if any, by which the implicit price deflator for the gross domestic product changed during the preceding calendar year.

(4)(A) The Secretary of Energy shall submit any bidding system authorized in subparagraph (H) of paragraph (1) to the Senate and House of Representatives. The Secretary may institute such bidding system unless either the Senate or the House of Represcntatives passes a resolution of disapproval within thirty days after receipt of the bidding system.

(B) Subparagraphs (C) through (J) of this paragraph are enacted by Congress—

(i) as an exercise of the rulemaking power of the Senate and the House of Representatives, respectively, and as such they are deemed a part of the rules of each House, respectively, but they are applicable only wtih respect to the procedures to be fol-

lowed in that House in the case of resolutions described by this paragraph, and they supersede other rules only to the extent that they are inconsistent therewith; and

(ii) with full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner, and to the same extent as in the case of any other rule of that House.

(C) A resolution disapproving a bidding system submitted pursuant to this paragraph shall immediately be referred to a committee (and all resolutions with respect to the same request shall be referred to the same committee) by the President of the Senate or the Speaker of the House of Representatives, as the case may be.

(D) If the committee to which has been referred any resolution disapproving the bidding system of the Secretary has not reported the resolution at the end of ten calendar days after its referral, it shall be in order to move either to discharge the committee from further consideration of the resolution or to discharge the committee from further consideration of any other resolution with respect to the same bidding system which has been referred to the committee.

(E) A motion to discharge may be made only by an individual favoring the resolution, shall be highly privileged (except that it may not be made after the committee has reported a resolution with respect to the same recommendation), and debate thereon shall be limited to not more than one hour, to be divided equally between

those favoring and those opposing the resolution. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(F) If the motion to discharge is agreed to or disagreed to, the motion may not be renewed, nor may another motion to discharge the committee be made with respect to any other resolution with respect to the same bidding system.

(G) When the committee has reported, or has been discharged from further consideration of, a resolution as provided in this paragraph, it shall be at any time thereafter in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the resolution. The motion shall be highly privileged and shall not be debatable. An amendment to the motion shall not be in order, and it shall not be in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(H) Debate on the resolution is limited to not more than two hours, to be divided equally between those favoring and those opposing the resolution. A motion further to limit debate is not debatable. An amendement to, or motion to recommit, the resolution is not in order, and it is not in order to move to reconsider the vote by which the resolution is agreed to or disagreed to.

(I) Motions to postpone, made with respect to the discharge from the committee, or the consideration of a resolution with respect to a bidding system, and motions to proceed to the consid-

eration of other business, shall be decided without debate.

(J) Appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a resolution with respect to a bidding system shall be decided without debate.

(5)(A) During the five-year period commencing on September 18, 1978, the Secretary may, in order to obtain statistical information to determine which bidding alternatives will best accomplish the purposes and policies of this subchapter, require, as to no more than 10 per centum of the tracts offered each year, each bidder to submit bids for any area of the outer Continental Shelf in accordance with more than one of the bidding systems set forth in paragraph (1) of this subsection. For such statistical purposes, leases may be awarded using a bidding alternative selected at random for the acquisition of valid statistical data if such bidding alternative is otherwise consistent with the provisions of this subchapter.

(B) The bidding systems authorized by paragraph (1) of this subsection, other than the system authorized by subparagraph (A), shall be applied to not less than 20 per centum and not more than 60 per centum of the total area offered for leasing each year during the five-year period beginning on September 18, 1978, unless the Secretary determines that the requirements set forth in this subparagraph are inconsistent with the purposes and policies of this subchapter.

(6) At least ninety days prior to notice of any lease sale under subparagraph (D), (E), (F), or if appropriate, (H) of paragraph (1), the Secretary shall by regulation establish rules to govern the calculation of net profits. In the event of any dispute between the United States and a lessee concerning the calculation of the net profits under the regulation issued pursuant to this paragraph, the burden of proof shall be on the lessee.

(7) After an oil and gas lease is granted pursuant to any of the work commitment options of paragraph (1) of this subsection—

(A) the lessee, at its option, shall deliver to the Secretary upon issuance of the lease either (i) a cash deposit for the full amount of the exploration work commitment, or (ii) a performance bond in form and substance and with a surety satisfactory to the Secretary, in the principal amount of such exploration work commitment assuring the Secretary that such commitment shall be faithfully discharged in accordance with this section, regulations, and the lease; and for purposes of this subparagraph, the principal amount of such cash deposit or bond may, in accordance with regulations, be periodically reduced upon proof, satisfactory to the Secretary, that a portion of the exploration work commitment has been satisfied;

(B) 50 per centum of all exploration expenditures on, or directly related to, the lease, including, but not limited to (i) geological investigations and related activities, (ii) geophysical in-

vestigations including seismic, geomagnetic, and gravity surveys, data processing and interpretation, and (iii) exploratory drilling, core drilling, redrilling, and well completion or abandonment, including the drilling of wells sufficient to determine the size and a real extent of any newly discovered field, and including the cost of mobilization and demobilization of drilling equipment, shall be included in satisfacion of the commitment, except that the lessee's general overhead cost shall not be so included against the work commiment, but its cost (including employee benefits) of employees directly assigned to such exploration work shall be so included; and

(C) if at the end of the primary term of the lease, including any extension thereof, the full dollar amount of the exploration work commitment has not been satisfied, the balance shall then be paid in cash to the Secretary.

(8) Not later than thirty days before any lease sale, the Secreary shall submit to the Congress and publish in the Federal Register a notice—

(A) identifying any bidding system which will be utilized for such lease sale and the reasons for the utilization of such bidding system; and

(B) designating the lease tracts selected which are to be offered in such sale under the bidding system authorized by subparagraph (A) of paragraph (1) and the lease tracts selected which are to be offered under any one or more of the bidding systems authorized by subparagraphs (B) through (H) of paragraph (1), and the reasons such lease tracts are to be offered under a particular bidding system.

(b) Terms and provisions of oil and gas leases

An oil and gas lease issued pursuant to this section shall—

(1) be for a tract consisting of a compact area not exceeding five thousand seven hundred and sixty acres, as the Secretary may determine, unless the Secretary finds that a larger area is necessary to comprise a reasonable economic production unit;

(2) be for an initial period of—

(A) five years; or

(B) not to exceed ten years where the Secretary finds that such longer period is necessary to encourage exploration and development in areas because of unusually deep water or other unusually adverse conditions.

and as long after such initial period as oil or gas is produced from the area in paying quantities, or drilling or well reworking operations as approved by the Secretary are conducted thereon;

(3) require the payment of amount or value as determined by one of the bidding systems set forth in subsection (a) of this section;

(4) entitle the lessee to explore, develop, and produce the oil and gas contained within the lease area, conditioned upon due diligence requirements and the approval of the development and production plan required by this subchapter;

(5) provide for suspension or cancellation of the lease during the initial lease term or thereafter pursuant to section 1334 of this title;

(6) contain such rental and other provisions as the Secretary may prescribe at the time of offering the area for lease; and

(7) provide a requirement that the lessee offer 20 per centum of the crude oil condensate, and natural gas liquids produced on such lease, at the market value and point of delivery applicable to Federal royalty oil, to small or independent refiners as defined in the Emergency Petroleum Allocation Act of 1973 [15 U.S.C. 751 et seq.].

(c) Antitrust review of lease sales

(1) Following each notice of a proposed lease sale and before the acceptance of bids and the issuance of leases based on such bids, the Secretary shall allow the Attorney General, in consultation with the Federal Trade Commission, thirty days to review the results of such lease sale, except that the Attorney General, after consultation with the Federal Trade Commission, may agree to a shorter review period.

(2) The Attorney General may, in consultation with the Federal Trade Commission, conduct such antitrust review on the likely effects the issuance of such leases would have on competition as the Attorney General, after consultation with the Federal Trade Commission, deems appropriate and shall advise the Secretary with respect to such review. The Secretary shall provide such information as the Attorney General, after consultation with the Federal Trade Commission, may require in order to conduct any antitrust review pursuant to this paragraph and to make recommendations pursuant to paragraph (3) of this subsection.

(3) The Attorney General, after consultation with the Federal Trade Commission, may make such recommendations to the Secretary, including the nonacceptance of any bid, as may be appropriate to prevent any situation inconsistent with the antitrust laws. If the Secretary determines or if the Attorney General advises the Secretary, after consultation with the Federal Trade Commission and prior to the issuance of any lease, that such lease may create or maintain a situation inconsistent with the antitrust laws, the Secretary may—

(A) refuse (i) to accept an otherwise qualified bid for such lease, or (ii) to issue such lease, notwithstanding subsection (a) of this section; or

(B) issue such lease, and notify the lessee and the Attorney General of the reason for such decision.

(4)(A) Nothing in this subsection shall restrict the power under any other Act or the common law of the Attorney General, the Federal Trade Commission, or any other Federal department or agency to secure information, conduct reviews, make recommendations, or seek appropriate relief.

(B) Neither the issuance of a lease nor anything in this subsection shall modify or abridge any private right of action under the antitrust laws.

(d) Due diligence

No bid for a lease may be submitted if the Secretary finds, after notice and hearing, that the bidder is not meeting due diligence requirements on other leases.

(e) Secretary's approval for sale, exchange, assignment, or other transfer of leases

No lease issued under this subchapter may be sold, exchanged, assigned, or otherwise transferred except with the approval of the Secretary. Prior to any such approval,

the Secretary shall consult with and give due consideration to the views of the Attorney General.

(f) Antitrust immunity or defenses

Nothing in this subchapter shall be deemed to convey to any person, association, corporation, or other business organization immunity from civil or criminal liability, or to create defenses to actions, under any antitrust law.

(g) Leasing of lands within three miles of seaward boundaries of coastal States; deposit of revenues; distribution of revenues

(1) At the time of soliciting nominations for the leasing of lands containing tracts wholly or partially within three nautical miles of the seaward boundary of any coastal State, and subsequently as new information is obtained or developed by the Secretary, the Secretary shall, in addition to the information required by section 1352 of this title, provide the Governor of such State—

(A) an identification and schedule of the areas and regions proposed to be offered for leasing;

(B) at the request of the Governor of such State, all information from all sources concerning the geographical, geological, and ecological characteristics of such tracts;

(C) an estimate of the oil and gas reserves in the areas proposed for leasing; and

(D) at the request of the Governor of such State, an identification of any field, geological structure, or trap located wholly or partially within three nautical miles of the seaward boundary of such coastal State, including all information relating to the entire field, geological structure, or trap.

The provisions of the first sentence of subsection (c) and the provisions of subsections (e) to (h) of section 1352 of this title shall be applicable to the release by the Secretary of any information to any coastal State under this paragraph. In addition, the provisions of subsections (c) and (e) to (h) of section 1352 of this title shall apply in their entirety to the release by the Secretary to any coastal State of any information relating to Federal lands beyond three nautical miles of the seaward boundary of such coastal State.

(2) Notwithstanding any other provision of this subchapter, the Secretary shall deposit into a separate account in the Treasury of the United States all bonuses, rents, and royalties, and other revenues (derived from any bidding system authorized under subsection (a)(1) of this section), excluding Federal income and windfall profits taxes, and derived from any lease issued after September 18, 1978 of any Federal tract which lies wholly (or, in the case of Alaska, partially until seven years from the date of settlement of any boundary dispute that is the subject of an agreement under section 1336 of this title entered into prior to January 1, 1986 or until April 15, 1993 with respect to any other tract) within three nautical miles of the seaward boundary of any coastal State, or (except as provided above for Alaska) in the case where a Federal tract lies partially within three nautical miles of the seaward boundary, a percentage of bonuses, rents, royalties, and other revenues (derived from any bidding system authorized under subsection (a)(1) of this section), excluding Federal income and windfall profits taxes, and derived from any lease issued after September 18, 1978 of such tract equal to the percentage of surface acreage of the tract that lies within such

three nautical miles. Except as provided in paragraph (5) of this subsection, not later than the last business day of the month following the month in which those revenues are deposited in the Treasury, the Secretary shall transmit to such coastal State 27 percent of those revenues, together with all accrued interest thereon. The remaining balance of such revenues shall be transmitted simultaneously to the miscellaneous receipts account of the Treasury of the United States.

(3) Whenever the Secretary or the Governor of a coastal State determines that a common potentially hydrocarbon-bearing area may underlie the Federal and State boundary, the Secretary or the Governor shall notify the other party in writing of his determination and the Secretary shall provide to the Governor notice of the current and projected status of the tract or tracts containing the common potentially hydrocarbon-bearing area. If the Secretary has leased or intends to lease such tract or tracts, the Secretary and the Governor of the coastal State may enter into an agreement to divide the revenues from production of any common potentially hydrocarbon-bearing area, by unitization or other royalty sharing agreement, pursuant to existing law. If the Secretary and the Governor do not enter into an agreement, the Secretary may nevertheless proceed with the leasing of the tract or tracts. Any revenues received by the United States under such an agreement shall be subject to the requirements of paragraph (2).

(4) The deposits in the Treasury account described in this section shall be invested by the Secretary of the Treasury in securities backed by the full faith and credit of the United States having maturities suitable to the needs of the account and yielding the

highest reasonably available interest rates as determined by the Secretary of the Treasury.

(5)(A) When there is a boundary dispute between the United States and a State which is subject to an agreement under section 1336 of this title, the Secretary shall credit to the account established pursuant to such agreement all bonuses, rents, and royalties, and other revenues (derived from any bidding system authorized under subsection (a)(1) of this section), excluding Federal income and windfall profits taxes, and derived from any lease issued after September 18, 1978 of any Federal tract which lies wholly or partially within three nautical miles of the seaward boundary asserted by the State, if that money has not otherwise been deposited in such account. Proceeds of an escrow account established pursuant to an agreement under section 1336 of this title shall be distributed as follows:

(i) Twenty-seven percent of all bonuses, rents, and royalties, and other revenues (derived from any bidding system authorized under subsection (a)(1) of this section), excluding Federal income and windfall profits taxes, and derived from any lease issued after September 18, 1978, of any tract which lies wholly within three nautical miles of the seaward boundary asserted by the Federal Government in the boundary dispute, together with all accrued interest thereon, shall be paid to the State either—

(I) within thirty days of December 1, 1987, or

(II) by the last business day of the month following the month in which those revenues are deposited in the Treasury, whichever date is later.

(ii) Upon the settlement of a boundary disputes which is subject to a section 1336 agreement between the United States and a State, the Secretary shall pay to such State any additional moneys due such State from amounts deposited in the escrow account. If there is insufficient money deposited in or credited to the escrow account, the Secretary shall transmit, from any revenues derived from any lease of Federal lands under this subchapter, the remaining balance due such State in accordance with the formula set forth in section 8004(b)(1)(B) of the Outer Continental Shelf Lands Act Amendments of 1985.

(B) This paragraph applies to all Federal oil and gas lease sales, under this subchapter, including joint lease sales, occurring after September 18, 1978.

(6) This section shall be deemed to take effect on October 1, 1985, for purposes of determining the amounts to be deposited in the separate account and the States' shares described in paragraph (2).

(7) When the Secretary leases any tract which lies wholly or partially within three miles of the seaward boundary of two or more States, the revenues from such tract shall be distributed as otherwise provided by this section, except that the State's share of such

revenues that would otherwise result under this section shall be divided equally among such States.

(h) State claims to jurisdiction over submerged lands

Nothing contained in this section shall be construed to alter, limit, or modify any claim of any State to any jurisdiction over, or any right, title, or interest in, any submerged lands.

(i) Sulphur leases; award to highest bidder; method of bidding

In order to meet the urgent need for further exploration and development of the sulphur deposits in the submerged lands of the outer Continental Shelf, the Secretary is authorized to grant to the qualified persons offering the highest cash bonuses on a basis of competitive bidding sulphur leases on submerged lands of the outer Continental Shelf, which are not covered by leases which include sulphur and meet the requirements of 1335(a) of this title, and which sulphur leases shall be offered for bid by sealed bids and granted on separate leases from oil and gas leases, and for a separate consideration, and without priority or preference accorded to oil and gas lessees on the same area.

(j) Terms and provisions of sulphur leases

A sulphur lease issued by the Secretary pursuant to this section shall (1) cover an area of such size and dimensions as the Secretary may determine, (2) be for a period of not more than ten years and so long thereafter as sulphur may be produced from the area in paying quantities or drilling, well reworking, plant construction, or other operations for the production of sulphur, as approved by the Secretary, are conducted thereon, (3) require the payment to the United States of such royalty as may be specified in the lease but not less than

5 per centum of the gross production or value of the sulphur at the wellhead, and (4) contain such rental provisions and such other terms and provisions as the Secretary may by regulation prescribe at the time of offering the area for lease.

(k) Other mineral leases; award to highest bidder; terms and conditions; agreements for use of resources for shore protection, beach or wetlands restoration, or other projects

(1) The Secretary is authorized to grant to the qualified persons offering the highest cash bonuses on a basis of competitive bidding leases of any mineral other than oil, gas, and sulphur in any area of the outer Continental Shelf not then under lease for such mineral upon such royalty, rental, and other terms and conditions as the Secretary may prescribe at the time of offering the area for lease.

(2)(A) Notwithstanding paragraph (1), the Secretary may negotiate with any person an agreement for the use of Outer Continental Shelf sand, gravel and shell resources—

(i) for use in a program of, or project for, shore protection, beach restoration, or coastal wetlands restoration undertaken by a Federal, State, or local government agency; or

(ii) for use in a construction project, other than a project described in clause (i), that is funded in whole or in part by or authorized by the Federal Government.

(B) In carrying out a negotiation under this paragraph, the Secretary may assess a fee based on an assessment of the value of the resources and the public interest served by promoting development of the resources. No fee shall be assessed directly or indirectly under this subparagraph against an agency of the Federal Government.

(C) The Secretary may, through this paragraph and in consultation with the Secretary of Commerce, seek to facilitate projects in the coastal zone, as such term is defined in section 1453 of Title 16, that promote the policy set forth in section 1452 of Title 16.

(D) Any Federal agency which proposes to make use of sand, gravel and shell resources subject to the provisions of this subchapter shall enter into a Memorandum of Agreement with the Secretary concerning the potential use of those resources. The Secretary shall notify the Committee on Merchant Marine and Fisheries and the Committee on Natural Resources of the House of Representatives and the Committee on Energy and Natural Resources of the Senate on any proposed project for the use of those resources prior to the use of those resources.

(l) Publication of notices of sale and terms of bidding

Notice of sale of leases, and the terms of bidding, authorized by this section shall be published at least thirty days before the date of sale in accordance with rules and regulations promulgated by the Secretary.

(m) Disposition of revenues

All moneys paid to the Secretary for or under leases granted pursuant to this section shall be deposited in the Treasury in accordance with section 1338 of this title.

(n) Issuance of lease as nonprejudicial to ultimate settlement or adjudication of controversies

The issuance of any lease by the Secretary pursuant to this subchapter, or the making of any interim arrangements by the Secretary pursuant to section 1336 of this title shall not prejudice the ultimate settlement or adjudication of the question as to whether or not the area involved is in the outer Continental Shelf.

(o) Cancellation of leases for fraud

The Secretary may cancel any lease obtained by fraud or misrepresentation.

(Aug. 7, 1953, ch. 345, § 8, 67 Stat. 468; Sept. 18, 1978, Pub. L. 95-372, title II, § 205(a), (b), 92 Stat. 640; April 7, 1986, Pub. L. 99-272, title VIII, § 8003, 100 Stat. 148; Dec. 22, 1987, Pub. L. 100-202, § 101(g) [title I, § 1], 101 Stat. 1329-225; Oct. 31, 1994, Pub. L. 103-426, § 1(a), 108 Stat. 4371.)

(As amended Nov. 28, 1995, Pub. L. 104-58, title III, §§ 302, 303, 109 Stat. 563, 565; Nov. 10, 1998, Pub. L. 105-362, title IX, § 901(k), 112 Stat. 3290.)

43 U.S.C. § 1340. Geological and geophysical explorations

(a) Approved exploration plans

(1) Any agency of the United States and any person authorized by the Secretary may conduct geological and geophysical explorations in the outer Continental Shelf, which do not interfere with or endanger actual operations under any lease maintained or granted pursuant to this subchapter, and which are not unduly harmful to aquatic life in such area.

(2) The provisions of paragraph (1) of this subsection shall not apply to any person conducting ex-

plorations pursuant to an approved exploration plan on any area under lease to such person pursuant to the provisions of this subchapter.

(b) Oil and gas exploration

Except as provided in subsection (f) of this section, beginning ninety days after September 18, 1978, no exploration pursuant to any oil and gas lease issued or maintained under this subchapter may be undertaken by the holder of such lease, except in accordance with the provisions of this section.

(c) Plan approval; State concurrence; plan provisions

(1) Except as otherwise provided in this subchapter, prior to commencing exploration pursuant to any oil and gas lease issued or maintained under this subchapter, the holder thereof shall submit an exploration plan to the Secretary for approval. Such plan may apply to more than one lease held by a lessee in any one region of the outer Continental Shelf, or by a group of lessees acting under a unitization, pooling, or drilling agreement, and shall be approved by the Secretary if he finds that such plan is consistent with the provisions of this subchapter, regulations prescribed under this subchapter including regulations prescribed by the Secretary pursuant to paragraph (8) of section 1334(a) of this title, and the provisions of such lease. The Secretary shall require such modifications of such plan as are necessary to achieve such consistency. The Secretary shall approve such plan, as submitted or modified, within thirty days of its submission, except that the Secretary shall disapprove such plan if he determines that (A) any proposed activity under such plan would result in any condition described in section 1334(a)(2)(A)(i) of this title, and (B) such

proposed activity cannot be modified to avoid such condition. If the Secretary disapproves a plan under the preceding sentence, he may, subject to section 1334(a)(2)(B) of this title cancel such lease and the lessee shall be entitled to compensation in accordance with the regulations prescribed under section 1334(a)(2)(C)(i) or (ii) of this title.

(2) The Secretary shall not grant any license or permit for any activity described in detail in an exploration plan and affecting any land use or water use in the coastal zone of a State with a coastal zone management program approved pursuant to section 1455 of Title 16, unless the State concurs or is conclusively presumed to concur with the consistency certification accompanying such plan pursuant to section 1456(a)(3)(B)(i) or (ii) of such Title 16, or the Secretary of Commerce makes the finding authorized by section 1456(c)(3)(B)(iii) of Title 16.

(3) An exploration plan submitted under this subsection shall include, in the degree of detail which the Secretary may by regulation require—

(A) a schedule of anticipated exploration activities to be understaken [sic];

(B) a description of equipment to be used for such activities;

(C) the general location of each well to be drilled; and

(D) such other information deemed pertinent by the Secretary.

(4) The Secretary may, by regulation, require that such plan be accompanied by a general statement of development and production intentions which shall be for planning purposes only and which shall not be binding on any party.

(d) Drilling permit

The Secretary may, by regulation, require any lessee operating under an approved exploration plan to obtain a permit prior to drilling any well in accordance with such plan.

(e) Plan revisions, conduct of exploration activities

(1) If a significant revision of an exploration plan approved under this subsection is submitted to the Secretary, the process to be used for the approval of such revision shall be the same as set forth in subsection (c) of this section.

(2) All exploration activities pursuant to any lease shall be conducted in accordance with an approved exploration plan or an approved revision of such plan.

(f) Drilling permits issued and exploration plans approved within 90-day period after September 18, 1978

(1) Exploration activities pursuant to any lease for which a drilling permit has been issued or for which an exploration plan has been approved, prior to ninety days after September 18, 1978, shall be considered in compliance with this section, except that the Secretary may, in accordance with section 1334(a)(1)(B) of this title, order a suspension or temporary prohibition of any exploration activities and require a revised exploration plan.

(2) The Secretary may require the holder of a lease described in paragraph (1) of this subsection to supply a general statement in accordance with subsection (c)(4) of this section, or to submit other information.

(3) Nothing in this subsection shall be construed to amend the terms of any permit or plan to which this subsection applies.

(g) Determinations requisite to issuance of permits

Any permit for geological explorations authorized by this section shall be issued only if the Secretary determines, in accordance with regulations issued by the Secretary, that—

(1) the applicant for such permit is qualified;

(2) the exploration will not interfere with or endanger operations under any lease issued or maintained pursuant to this subchapter; and

(3) such exploration will not be unduly harmful to aquatic life in the area, result in pollution, create hazardous or unsafe conditions, unreasonably interfere with other uses of the area, or disturb any site, structure, or object of historical or archeological significance.

(h) Lands beneath navigable waters adjacent to Phillip Burton Wilderness

The Secretary shall not issue a lease or permit for, or otherwise allow, exploration, development, or production activities within fifteen miles of the boundaries of the Philip Burton Wilderness as depicted on a may entitled "Wilderness Plan, Point Reyes National Seashore", numbered 612-90,000-B and dated September 1976, unless the State of California issues a lease or permit for, or otherwise allows, exploration, development, or production activities on lands beneath navigable waters (as such term is defined in section 1301 of this title of such State which are adjacent to such Wilderness.

(Aug. 7, 1953, ch 345, § 11, 67 Stat. 469; Sept. 18, 1978, Pub.L. 95-372, title II, § 206, 92 Stat. 647; July 19, 1985, Pub.L. 99-68, § 1, 99 Stat. 166.)

43 U.S.C. § 1351. Oil and gas development and production

(a) Development and production plans; submission to Secretary; statement of facilities and operation; submission to Governors of affected States and local governments

(1) Prior to development and production pursuant to an oil and gas lease issued after September 18, 1978, in any area of the outer Continental Shelf, other than the Gulf of Mexico, or issued or maintained prior to September 18, 1978 in any area of the outer Continental Shelf, other than the Gulf of Mexico, with respect to which no oil or gas has been discovered in paying quantities prior to September 18, 1978, the lessee shall submit a development and production plan (hereinafter in this section referred to as a "plan") to the Secretary, for approval pursuant to this section.

(2) A plan shall be accompanied by a statement describing all facilities and operations, other than those on the outer Continental Shelf, proposed by the lessee and known by him (whether or not owned or operated by such lessee) which will be constructed or utilized in the development and production of oil or gas from the lease area, including the location and site of such facilities and operations, the land, labor, material, and energy requirements associated with such facilities and operations, and all environmental and safety safeguards to be implemented.

(3) Except for any privileged or proprietary information (as such term is defined in regulations issued by the Secretary), the Secretary, within ten days after receipt of a plan and statement, shall (A) submit such plan and statement to the Governor of any

affected State, and, upon request, to the executive of any affected local government, and (B) make such plan and statement available to any appropriate interstate regional entity and the public.

(b) Development and production activities in accordance with plan as lease requirement

After September 18, 1978, no oil and gas lease may be issued pursuant to this subchapter in any region of the outer Continental Shelf, other than the Gulf of Mexico, unless such lease requires that development and production activities be carried out in accordance with a plan which complies with the requirements of this section.

(c) Scope and contents of plan

A plan may apply to more than one oil and gas lease, and shall set forth, in the degree of detail established by regulations issued by the Secretary—

(1) the specific work to be performed;

(2) a description of all facilities and operations located on the outer Continental Shelf which are proposed by the lessee or known by him (whether or not owned or operated by such lessee) to be directly related to the proposed development, including the location and size of such facilities and operations, and the land, labor, material, and energy requirements associated with such facilities and operations;

(3) the environmental safeguards to be implemented on the outer Continental Shelf and how such safeguards are to be implemented;

(4) all safety standards to be met and how such standards are to be met;

(5) an expected rate of development and production and a time schedule for performance; and

(6) such other relevant information as the Secretary may by regulation require.

(d) State concurrence in land or water zone use in coastal zone of State

The Secretary shall not grant any license or permit for any activity described in detail in a plan and affecting any land use or water use in the coastal zone of a State with a coastal zone management program approved pursuant to section 306 of the Coastal Zone Management Act of 1972 (16 U.S.C. 1455), unless the State concurs or is conclusively presumed to concur with the consistency certification accompanying such plan pursuant to section 307(c)(3)(B)(i) or (ii) of such Act [16 U.S.C. 1456(c)(3)(B)(i) or (ii)], or the Secretary of Commerce makes the finding authorized by section 307(c)(3)(B)(iii) of such Act [16 U.S.C. 1456(c)(3)(B)(iii)].

(e) Declaration of approval of development and production plan as major Federal action; submission of preliminary or final lease plans prior to commencement of National Environmental Policy provisions procedures

(1) At least once the Secretary shall declare the approval of a development and production plan in any area or region (as defined by the Secretary) of the outer Continental Shelf, other than the Gulf of Mexico, to be a major Federal action.

(2) The Secretary may require lessees of tracts for which development and production plans have not been approved, to submit preliminary or final plans for their leases, prior to or immediately after a determination by the Secretary that the procedures under the National Environmental Policy Act of 1969 [42 U.S.C. 4321 et seq.] shall commence.

(f) Plans considered major Federal actions; submission of draft environmental impact statement to Governors of affected States and local governments

If approval of a development and production plan is found to be a major Federal action, the Secretary shall transmit the draft environmental impact statement to the Governor of any affected State, and upon request, to the executive of any local government, and shall make such draft available to any appropriate interstate regional entity and the public.

(g) Plans considered nonmajor Federal actions; comments and recommendations from States

If aproval of a development and production plan is not found to be a major Federal action, the Governor of an affected State and the executive of any affected local government shall have sixty days from the date of receipt of the plan from the Secretary to submit comments and recommendations. Prior to submitting recommendations to the Secretary, the executive of any affected local government must forward his recommendations to the Governor of his State. Such comments and recommendations shall be made available to the public upon request. In addition, any interested person may submit comments and recommendations.

(h) Approval, disapproval or modification of plan; reapplication; periodic review

(1) After reviewing the record of any public hearing held with respect to the approval of a plan pursuant to the National Environmental Policy Act of 1969 [42 U.S.C. 4321 et seq.] or the comments and recommendations submitted under subsection (g) of this section, the Secretary shall, within sixty days after the release of the final environmental impact statement prepared pursuant to the National

Environmental Policy Act of 1969 in accordance with subsection (e) of this section, or sixty days after the period provided for comment under subsection (g) of this section, approve, disapprove, or require modifications of the plan. The Secretary shall require modification of a plan if he determines that the lessee has failed to make adequate provision in such plan for safe operations on the lease area or for protection of the human, marine, or coastal environment, including compliance with the regulations prescribed by the Secretary pursuant to paragraph (8) of section 1334(a) of this title. Any modification required by the Secretary which involves activities for which a Federal license or permit is required and which affects any land use or water use in the coastal zone of a State with a coastal zone management program approved pursuant to section 306 of the Coastal Zone Management Act of 1972 (16 U.S.C. 1455) must receive concurrence by such State with respect to the consistency certification accompanying such plan pursuant to section 307(c)(3)(B)(i) or (ii) of such Act [16 U.S.C. 1456(c)(3)(B)(i) or (ii)] unless the Secretary of Commerce makes the finding authorized by section 307(c)(3)(B)(iii) of such Act [16 U.S.C. 1456(c)(3)(B)(iii)]. The Secretary shall disapprove a plan—

(A) if the lessee fails to demonstrate that he can comply with the requirements of this subchapter or other applicable Federal law, including the regulations prescribed by the Secretary pursuant to paragraph (8) of section 1334(a) of this title.

(B) if any of the activities described in detail in the plan for which a Federal license or permit is required and which affects any land use

or water use in the coastal zone of a State with a coastal zone management program approved pursuant to section 306 of the Coastal Zone Management Act of 1972 (16 U.S.C. 1455) do not receive concurrence by such State with respect to the consistency certification accompanying such plan pursuant to section 307(c)(3)(B)(i) or (ii) of such Act [16 U.S.C. 1456(c)(3)(B)(i) or (ii)] and the Secretary of Commerce does not make the finding authorized by section 307(c)(3)(B)(iii) of such Act [16 U.S.C. 1456(c)(3)(b)(iii)];

(C) if operations threaten national security or national defense; or

(D) if the Secretary determines, because of exceptional geological conditions in the lease areas, exceptional resource values in the marine or coastal environment, or other exceptional circumstances, that (i) implementation of the plan would probably cause serious harm or damage to life (including fish and other aquatic life), to property, to any mineral deposits (in areas leased or not leased), to the national security or defense, or to the marine, coastal or human environments, (ii) the threat of harm or damage will not disappear or decrease to an acceptable extent within a reasonable period of time, and (iii) the advantages of disapproving the plan outweigh the advantages of development and production.

(2)(A) If a plan is disapproved—

(i) under paragraph (A) of paragraph (1); or

(ii) under subparagraph (B) of paragraph (1) with respect to a lease issued after approval of a coastal zone management program pursuant to the Coastal Zone Management Act of 1972 (16 U.S.C. 1455),

the lessee shall not be entitled to compensation because of such disapproval.

(B) If a plan is disapproved—

(i) under subparagraph (C) or (D) of paragraph (1); or

(ii) under subparagraph (B) of paragraph (1) with respect to a lease issued before approval of a coastal zone management program pursuant to the Coastal Zone Management Act of 1972 [16 U.S.C. 1451 et seq.], and such approval occurs after the lessee has submitted a plan to the Secretary.

the term of the lease shall be duly extended, and at any time within five years after such disapproval, the lessee may reapply for approval of the same or a modified plan, and the Secretary shall approve, disapprove, or require modifications of such plan in accordance with this subsection.

(C) Upon expiration of the five-year period described in subparagraph (B) of this paragraph, or, in the Secretary's discretion, at an earlier time upon request of a lessee, if the Secretary has not approved a plan, the Secretary shall cancel the lease and the lessee shall be entitled to receive compensation in accordance with section 1334 (a)(2)(C) of this title. The Secre-

tary may, at any time within the five-year period described in subparagraph (B) of this paragraph, require the lessee to submit a development and production plan for approval, disapproval, or modification. If the lessee fails to submit a required plan expeditiously and in good faith, the Secretary shall find that the lessee has not been duly diligent in pursuing his obligations under the lease, and shall immediately initiate procedures to cancel such lease, without compensation, under the provisions of section 1334(c) of this title.

(3) The Secretary shall, from time to time, review each plan approved under this section. Such review shall be based upon changes in available information and other onshore or offshore conditions affecting or impacted by development and production pursuant to such plan. If the review indicates that the plan should be revised to meet the requirements of this subsection, the Secretary shall require such revision.

(i) Approval of revision of approved plan

The Secretary may approve any revision of an approved plan proposed by the lessee if he determines that such revision will lead to greater recovery of oil and natural gas, improve the efficiency, safety, and environmental protection of the recovery operation, is the only means available to avoid substantial economic hardship to the lessee, or is otherwise not inconsistent with the provisions of this subchapter, to the extent such revision is consistent with protection of the human, marine, and coastal environments. Any revision of an approved plan which the Secretary determines is significant shall be reviewed in accordance with subsection (d) through (f) of this section.

(j) Cancellation of lease on failure to submit plan or comply with approved plan

Whenever the owner of any lease fails to submit a plan in accordance with regulations issued under this section, or fails to comply with an approved plan, the lease may be canceled in accordance with section 1334(c) and (d) of this title. Termination of a lease because of failure to comply with an approved plan, including required modification or revisions, shall not entitle a lessee to any compensation.

(k) Production and transportation of natural gas; submission of plan to Federal Energy Regulatory Commission; impact statement

If any development and production plan submitted to the Secretary pursuant to this section provides for the production and transportation of natural gas, the lessee shall contemporaneously submit to the Federal Energy Regulatory Commission that portion of such plan which relates to production of natural gas and the facilities for transportation of natural gas. The Secretary and the Federal Energy Regulation Commission shall agree as to which of them shall prepare an environmental impact statement pursuant to the National Environmental Policy Act of 1969 [42 U.S.C. 4321 et seq.] applicable to such portion of such plan, or conduct studies as to the effect on the environment of implementing it. Thereafter, the findings and recommendations by the agency preparing such environmental impact statement or conducting such studies pursuant to such agreement shall be adopted by the other agency, and such other agency shall not independently prepare another environmental impact statement or duplicate such studies with respect to such portion of such plan, but the Federal Energy Regulatory Commission, in connection with its review of an application for

a certificate of public convenience and necessity applicable to such transportation facilities pursuant to section 717f of title 15, may prepare such environmental studies or statement relevant to certification of such transportation facilities as have not been covered by an environmental impact statement or studies prepared by the Secretary. The Secretary, in consultation with the Federal Energy Regulatory Commission, shall promulgate rules to implement this subsection, but the Federal Energy Regulatory Commission shall retain sole authority with respect to rules and procedures applicable to the filing of any application with the Commission and to all aspects of the Commission's review of, and action on, any such aplication.

(l) Application of provisions to leases in Gulf of Mexico

The Secretary may require the provisions of this section to apply to an oil and gas lease issued or maintained under this subchapter, which is located in that area of the Gulf of Mexico which is adjacent to the State of Florida, as determined pursuant to section 1333(a)(2) of this title.

(Aug. 7, 1953, ch 345, § 25, as added Sept. 18, 1978, Pub.L. 95-372, title II, § 208, 92 Stat. 659.)

APPENDIX F

Outer Banks Protection Act, Pub. L. No. 101-380, § 6003, 104 Stat. 484, 555 (1990)

SEC. 6003. OUTER BANKS PROTECTION.

(a) SHORT TITLE.—This section may be cited as the "Outer Banks Protection Act".

(b) FINDINGS.—The Congress finds that—

(1) the Outer Banks of North Carolina is an area of exceptional environmental fragility and beauty;

(2) the annual economic benefits of commercial and recreational fishing activities to North Carolina, which could be adversely affected by oil or gas development offshore the State's coast, exceeds $1,000,000,000;

(3) the major industry in coastal North Carolina is tourism, which is subject to potentially significant disruption by offshore oil or gas development;

(4) the physical oceanographic characteristics of the area offshore North Carolina between Cape Hatteras and the mouth of the Chesapeake Bay are not well understood, being affected by Gulf Stream western boundary perturbations and accompanying warm filaments, warm and cold core rings which separate from the Gulf Stream, wind stress, outflow from the Chesapeake Bay, Gulf Stream meanders, and intrusions of Virginia coastal waters around and over the Diamond shoals;

(5) diverse and abundant fisheries resources occur in the western boundary area of the Gulf Stream offshore North Carolina, but little is understood of the complex ecological relationships between the life

histories of those species and their physical, chemical, and biological environment;

(6) the environmental impact statements prepared for Outer Continental Shelf lease sales numbered 56 (1981) and 78 (1983) contain insufficient and outdated environmental information from which to make decisions on approval of additional oil and gas leasing, exploration, and development activities;

(7) the draft environmental report, dated November 1, 1989, and the preliminary final environmental report dated June 1, 1990, prepared pursuant to a July 14, 1989 memorandum of understanding between the State of North Carolina, the Department of the Interior, and the Mobil Oil Company, have not allayed concerns about the adequacy of the environmental information available to determine whether to proceed with additional offshore leasing, exploration, or development offshore North Carolina; and

(8) the National Research Council report entitled "The Adequacy of Environmental Information for Outer Continental Shelf Oil and Gas Decisions: Florida and California", issued in 1989, concluded that—

(A) information with respect to those States, which have received greater scrutiny than has North Carolina, is inadequate; and

(B) there are serious generic defects in the Minerals Management Service's methods of environmental analysis,

reinforcing concerns about the adequacy of the scientific and technical information which are the basis for a decision to lease additional tracts or approve an exploration plan offshore North Carolina, especially with respect to oceanographic, ecological, and socioeconomic information.

(c) PROHIBITION OF OIL AND GAS LEASING, EXPLORATION, AND DEVELOPMENT.—

(1) PROHIBITION.—The Secretary of the Interior shall not—

(A) conduct a lease sale;

(B) issue any new leases;

(C) approve any exploration plan;

(D) approve any development and production plan;

(E) approve any application for permit to drill; or

(F) permit any drilling,

for oil or gas under the Outer Continental Shelf Lands Act on any lands of the Outer Continental Shelf offshore North Carolina.

(2) BOUNDARIES.—For purposes of paragraph (1), the term "offshore North Carolina" means the area within the lateral seaward boundaries between areas offshore North Carolina and areas offshore—

(A) Virginia as provided in the joint resolution entitled "Joint resolution granting the consent of Congress to an agreement between the States of North Carolina and Virginia establishing their lateral seaward boundary" approved October 27, 1972 (86 Stat. 1298); and

(B) South Carolina as provided in the Act entitled "An Act granting the consent of Congress to the agreement between the States of North Carolina and South Carolina establishing

their lateral seaward boundary" approved October 9, 1981 (95 Stat. 988).

(3) DURATION OF PROHIBITION.—

(A) IN GENERAL.—The prohibition under paragraph (1) shall remain in effect until the later of—

(i) October 1, 1991; or

(ii) 45 days of continuous session of the Congress after submission of a written report to the Congress by the Secretary of the Interior, made after consideration of the findings and recommendations of the Environmental Sciences Review Panel under subsection (e)—

(I) certifying that the information available, including information acquired pursuant to subsection (d), is sufficient to enable the Secretary to carry out his responsibilities under the Outer Continental Shelf Lands Act with respect to authorizing the activities described in paragraph (1); and

(II) including a detailed explanation of any differences between such certification and the findings and recommendations of the Environmental Sciences Review Panel under subsection (e), and a detailed justification of each such difference.

(B) CONTINUOUS SESSION OF CONGRESS.—In computing any 45-day period of continuous session of Congress under subparagraph (A)(ii)—

(i) continuity of session is broken only by an adjournment of the Congress sine die; and

(ii) the days on which either House of Congress is not in session because of an adjournment of more than 3 days to a day certain are excluded.

(d) ADDITIONAL ENVIRONMENTAL INFORMATION.—The Secretary of the Interior shall undertake ecological and socioeconomic studies, additional physical oceanographic studies, including actual field work and the correlation of existing data, and other additional environmental studies, to obtain sufficient information about all significant conditions, processes, and environments which influence, or may be influenced by, oil and gas leasing, exploration, and development activities offshore North Carolina to enable the Secretary to carry out his responsibilities under the Outer Continental Shelf Lands Act with respect to authorizing the activities described in subsection (c)(1). During the time that the Environmental Sciences Review Panel established under subsection (e) is in existence, the Secretary of the Interior shall consult with such Panel in carrying out this subsection.

(e) ENVIRONMENTAL SCIENCES REVIEW PANEL.—

(1) ESTABLISHMENT AND MEMBERSHIP. — There shall be established an Environmental Sciences Review Panel, to consist of—

(A) 1 marine scientist selected by the Secretary of the Interior;

(B) 1 marine scientist selected by the Governor of North Carolina; and

(C) 1 person each from the disciplines of physical oceanography, ecology, and social science, to be selected jointly by the Secretary of the Interior and the Governor of North Carolina from a list of individuals nominated by the National Academy of Sciences.

(2) FUNCTIONS.—Not later than 6 months after the date of the enactment of this Act, the Environmental Sciences Review Panel shall—

(A) prepare and submit to the Secretary of the Interior findings and recommendations—

(i) assessing the adequacy of available physical oceanographic, ecological, and socioeconomic information in enabling the Secretary to carry out his responsibilities under the Outer Continental Shelf Lands Act with respect to authorizing the activities described in subsection (c)(1); and

(ii) if such available information is not adequate for such purposes, indicating what additional information is required to enable the Secretary to carry out such responsibilities; and

(B) consult with the Secretary of the Interior as provided in subsection (d).

(3) EXPENSES.—Each member of the Environmental Sciences Review Panel shall be reimbursed for actual travel expenses and shall receive per diem in lieu of subsistence for each day such member is engaged in the business of the Environmental Sciences Review Panel.

(4) TERMINATION.—The Environmental Sciences Review Panel shall be terminated after the submis-

sion of all findings and recommendations required under paragraph (2)(A).

(f) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated to the Secretary of the Interior to carry out this section not to exceed $500,000 for fiscal year 1991, to remain available until expended.

APPENDIX G

16 U.S.C. § 1456. Coordination and cooperation

(a) Federal agencies. In carrying out his functions and responsibilities under this title, the Secretary shall consult with, cooperate with, and, to the maximum extent practicable, coordinate his activities with other interested Federal agencies.

(b) Adequate consideration of views of Federal agencies. The Secretary shall not approve the management program submitted by a state pursuant to section 1455 of this title unless the views of Federal agencies principally affected by such program have been adequately considered.

(c) Consistency of Federal activities with State management programs; Presidential exemption; certification. (1)(A) Each Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs. A Federal agency activity shall be subject to this paragraph unless it is subject to paragraph (2) or (3).

(B) After any final judgment, decree, or order of any Federal court that is appealable under section 1291 or 1292 of title 28, or under any other applicable provision of Federal law, that a specific Federal agency activity is not in compliance with subparagraph (A), and certification by the Secretary that mediation under subsection (h) is not likely to result in such compliance, the President may, upon written request

from the Secretary, exempt from compliance those elements of the Federal agency activity that are found by the Federal court to be inconsistent with an approved State program, if the President determines that the activity is in the paramount interest of the United States. No such exemption shall be granted on the basis of a lack of appropriations unless the President has specifically requested such appropriations as part of the budgetary process, and the Congress has failed to make available the requested appropriations.

(C) Each Federal agency carrying out an activity subject to paragraph (1) shall provide a consistency determination to the relevant State agency designated under section 1455(d)(6) of this title at the earliest practicable time, but in no case later than 90 days before final approval of the Federal activity unless both the Federal agency and the State agency agree to a different schedule.

(2) Any Federal agency which shall undertake any development project in the coastal zone of a state shall insure that the project is, to the maximum extent practicable, consistent with the enforceable policies of approved state management programs.

(3)(A) After final approval by the Secretary of state's management program, any applicant for a required Federal license or permit to conduct an activity, in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification and the pro-

posed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program. At the same time, the applicant shall furnish to the state or its designated agency a copy of the certification, with all necessary information and data. Each coastal state shall establish procedures for public notice in the case of all such certifications and, to the extent it deems appropriate, procedures for public hearings in connection therewith. At the earliest practicable time, the state of its designated agency shall notify the Federal agency concerned that the state concurs with or objects to the applicant's certification. If the state or its designated agency fails to furnish the required notification within six months after receipt of its copy of the applicant's certification, the state's concurrence with the certification shall be conclusively presumed. No license or permit shall be granted by the Federal agency until the state or its designated agency has concurred with the applicant's certification or until, by the state's failure to act, the concurrence is conclusively presumed, unless the Secretary, on his own initiative or upon appeal by the applicant, finds, after providing a reasonable opportunity for detailed comments from the Federal agency involved and from the state, that the activity is consistent with the objectives of this title or is otherwise necessary in the interest of national security.

(B) After the management program of any coastal state has been approved by the Secretary under section 1455 of this title, any person

who submits to the Secretary of the Interior any plan for the exploration or development of, or production from, any area which has been leased under the Outer Continental Shelf Lands Act (43 U.S.C. 1331 et seq.) and regulations under such Act shall, with respect to any exploration, development, or production described in such plan and affecting any land or water use or natural resource of the coastal zone of such state, attach to such plan a certification that each activity which is described in detail in such plan complies with the enforceable policies of such state's approved management program and will be carried out in a manner consistent with such program. No Federal official or agency shall grant such person any license or permit for any activity described in detail in such plan until such state or its designated agency receives a copy of such certification and plan, together with any other necessary data and information, and until—

(i) such state or its designated agency, in accordance with the procedures required to be established by such state pursuant to subparagraph (A), concurs with such person's certification and notifies the Secretary and the Secretary of the Interior of such concurrence;

(ii) concurrence by such state with such certification is conclusively presumed as provided for in subparagraph (A), except if such state fails to concur with or object to such certification within three months after receipt of its copy of such certification and supporting information, such state shall provide the Secretary, the appropriate federal agency, and such person with a written statement describing the status

of review and the basis for further delay in issuing a final decision, and if such statement is not so provided, concurrence by such state with such certification shall be conclusively presumed; or

(iii) the Secretary finds, pursuant to subparagraph (A), that each activity which is described in detail in such plan is consistent with the objectives of this title or is otherwise necessary in the interest of national security.

If a state concurs or is conclusively presumed to concur, or if the Secretary makes such a finding, the provisions of subparagraph (A) are not applicable with respect to such person, such state, and any Federal license or permit which is required to conduct any activity affecting land uses or water uses in the coastal zone of such state which is described in detail in the plan to which such concurrence or finding applies. If such state objects to such certification and if the Secretary fails to make a finding under clause (iii) with respect to such certification, or if such person fails substantially to comply with such plan as submitted, such person shall submit an amendment to such plan, or a new plan, to the Secretary of the Interior. With respect to any amendment or new plan submitted to the Secretary of the Interior pursuant to the preceding sentence, the applicable time period for purposes of concurrence by conclusive presumption under subparagraph (A) is 3 months.

(d) Applications of local governments for Federal assistance; relationship of activities with approved management programs. State and local governments submitting applications for Federal assistance under other Federal programs, in or outside of the coastal zone, affecting any land or water use of natural resource of the coastal zone shall indicate the views of the appropriate state or local agency as to the relationship of such activities to the approved management program for the coastal zone. Such applications shall be submitted and coordinated in accordance with the provisions of Section 6506 of title 31. Federal agencies shall not approve proposed projects that are inconsistent with the enforceable policies of a coastal state's management program, except upon a finding by the Secretary that such project is consistent with the purposes of this title or necessary in the interest of national security.

(e) Construction with other laws. Nothing in this title shall be construed—

(1) to diminish either Federal or state jurisdiction, responsibility, or rights in the field of planning, development, or control of water resources, submerged lands, or navigable waters; nor to displace, supersede, limit, or modify any interstate compact or the jurisdiction or responsibility of any legally established joint or common agency of two or more states or of two or more states and the Federal Government; nor to limit the authority of Congress to authorize and fund projects;

(2) as superseding, modifying, or repealing existing laws applicable to the various Federal agencies; nor to affect the jurisdiction, powers, or prerogatives of the International Joint Commission, United States and Canada, the Permanent Engineering Board, and the United States operating entity or entities established pursuant to the Columbia River Basin Treaty, signed at Washington, January 17, 1961, or the In-

ternational Boundary and Water Commission, United States and Mexico.

(f) Construction with existing requirements of water and air pollution programs. Notwithstanding any other provision of this title, nothing in this title shall in any way affect any requirement (1) established by the Federal Water Pollution Control Act, as amended [33 U.S.C. 1251 et seq.], or the Clean Air Act, as amended [42 U.S.C. 7401 et seq.], or (2) established by the Federal Government or by any state or local government pursuant to such Acts. Such requirements shall be incorporated in any program developed pursuant to this title and shall be the water pollution control and air pollution control requirements applicable to such program.

(g) Concurrence with programs which affect inland areas. When any state's coastal zone management program, submitted for approval or proposed for modification pursuant to section 1455 of this title, includes requirements as to shorelands which also would be subject to any Federally supported national land use program which may be hereafter enacted, the Secretary, prior to approving such program, shall obtain the concurrence of the Secretary of the Interior, or such other Federal official as may be designated to administer the national land use program, with respect to that portion of the coastal zone management program affecting such inland areas.

(h) Mediation of disagreements. In case of serious disagreement between any Federal agency and a coastal state—

(1) in the development or the initial implementation of a management program under section 1454 of this title; or

(2) in the administration of a management program approved under section 1455 of this title;

the Secretary, with the cooperation of the Executive Office of the President, shall seek to mediate the differences involved in such disagreement. The process of such mediation shall, with respect to any disagreement described in paragraph (2), include public hearings which shall be conducted in the local area concerned.

(i) Federal fee. (1) With respect to appeals under subsections (c)(3) and (d) of this section which are submitted after November 5, 1990, the Secretary shall collect an application fee of not less than $200 for minor appeals and not less than $500 for major appeals, unless the Secretary, upon consideration of an applicant's request for a fee waiver, determines that the applicant is unable to pay the fee.

(2)(A) The Secretary shall collect such other fees as are necessary to recover the full costs of administering and processing such appeals under subsection (c) of this section.

(B) If the Secretary waives the application fee under paragraph (1) for an applicant, the Secretary shall waive all other fees under this subsection for the applicant.

(3) Fees collected under this subsection shall be deposited into the Coastal Zone Management Fund established under section 1456a of this title.

(June 17, 1966, Pub. L. 89-454, Title III, § 307, as added Oct. 27, 1972, Pub. L. 92-583, 86 Stat. 1285; July 26, 1976, Pub. L. 94-370, § 6, 90 Stat. 1018; Sept. 18, 1978, Pub. L. 95-372, Title V, § 504, 92 Stat. 693.)

(As amended Nov. 5, 1990, Pub. L. 101-508, Title VI, Subtitle C, § 6208, 104 Stat. 1388-307; Nov. 4, 1992, Pub. L. 102-587, Title II, Subtitle B, § 2205(b)(13), (14), 106 Stat. 5051.)

APPENDIX H

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

OIL AND GAS LEASE OF SUBMERGED LANDS
UNDER THE OUTER CONTINENTAL SHELF LANDS ACT

Office New Orleans, LA

Cash bonus $15,724,000.00

Minimum royalty rate $8.00 per hectare

Work commitment

Serial number OCS-A 0220

Rental rate $8.00 per hectare

Royalty rate 12½ percent

Profit share rate

This lease is effective as of Sept. 1, 1981 (hereinafter called the "Effective Date") by and between the United States of America (hereinafter called the "Lessor"), by the Manager, New Orleans OCS Offi—Bureau of Land Management, its authorized officer, and

Mobil Oil Corporation	33.334%
Amerada Hess Corporation	33.333%
Marathon Oil Company	33.333%

(hereinafter called the "Lessee"). In consideration of any cash payment heretofore made by the Lessee to the Lessor

and in consideration of the promises, terms, conditions, and covenants contained herein, including the Stipulation(s) numbered 1, 2, 3, 7 and 9 attached hereto, the Lessee and Lessor agree as follows:

Sec. 1. Statutes and Regulations. This lease is issued pursuant to the Outer Continental Shelf Lands Act of August 7, 1953, 67 Stat. 462 as amended; 43 U.S.C. 1331 et. seq. (hereinafter called the "Act"). The lease is issued subject to the Act; Sections 302 and 303 of the Department of Energy Organization Act, 91 Stat. 578, 42 U.S.C. 7152 and 7153; all regulations issued pursuant to such statutes and in existence upon the effective date of this lease; all regulations issued pursuant to such statutes in the future which provide for the prevention of waste and the conservation of the natural resources of the Outer Continental Shelf, and the protection of correlative rights therein, and all other applicable statutes and regulations.

Sec. 2. Rights of Lessee. The Lessor hereby grants and leases to the Lessee the exclusive right and privilege to drill for, develop, and produce oil and gas resources, except helium gas, in the submerged lands of the Outer Continental Shelf described as follows:

All of Block 777, Carrituck Sound, as shown on OCS Official Protection Diagram, NJ 18-11

(a) the nonexclusive right to conduct within the leased area geological and geophysical explorations in accordance with applicable regulations;

(b) the nonexclusive right to drill water wells within the leased area, unless the water is part of geopressured-geothermal and associated resources, and to use the water produced therefrom for operations pursuant to the Act free of cost, on the condition that the drilling is con-

ducted in accordance with procedures approved by the Director of the United States Geological Survey or the Director's delegate (hereinafter called the "Director"); and

(c) the right to construct or erect and to maintain within the leased area artificial islands, installations, and other devices permanently or temporarily attached to the seabed and other works and structures necessary to the full enjoyment of the lease, subject to compliance with applicable laws and regulations.

Sec. 3 Terms. This lease shall continue for an initial period of ten years from the Effective Date of the lease and so long thereafter as oil or gas is produced from the leased area is paying quantities, or drilling or well reworking operations, as approved by the Lessor, are conducted thereon.

Sec. 4. Rentals. The Lessee shall pay to the Lessor, on or before the first day of each lease year which commences prior to a discovery in paying quantities of oil or gas on the leased area, a rental of ———— per acre ($8.00 per hectare) or fraction thereof.

Sec. 5. Minimum Royalty. The Lessee shall pay the Lessor at the expiration of each lease year which commences after a discovery of oil and gas in paying quantities, a minimum royalty of ———— per acre ($8.00 per hectare) or fraction thereof or, if there is production, the difference between the actual royalty required to be paid with respect to such lease year and the prescribed minimum royalty, if the actual royalty paid is less than the minimum royalty.

Sec. 6. Royalty on Production. (a) The Lessee shall pay a fixed royalty of 12½ percent in amount or value of production saved, removed, or sold from the leased area. Gas of all kinds (except helium) is subject to royalty.

The Lessor shall determine whether production royalty shall be paid in amount or value.

(b) The value of production for purposes of computing royalty on production from this lease shall never be less than the fair market value of the production. The value of production shall be the estimated reasonable value of the production as determined by the Lessor, due consideration being given to the highest price paid for a part or for a majority of production of like quality in the same field or area, to the price received by the Lessee, to posted prices, to regulated prices, and to other relevant matters. Except when the Lessor, in its discretion, determines not to consider special pricing relief from otherwise applicable Federal regulatory requirements, the value of production for the purposes of computing royalty shall not be deemed to be less than the gross proceeds accruing to the Lessee from the sale thereof. In the absence of good reason to the contrary, value computed on the basis of the highest price paid or offered at the time of production is a fair and open market for the major portion of like-quality products produced and sold from the field or area where the leased area is situated, will be considered to be a reasonable value.

(c) When paid in value, royalties on production shall be due and payable monthly on the last day of the month most following the month in which the production is obtained, unless the Lessor designates a later time. When paid in amount, such royalties shall be delivered at pipeline connections or in tanks provided by the Lessee. Such deliveries shall be made at reasonable times and intervals and, at the Lessor's option, shall be effected either (i) on or immediately adjacent to the leased area, without cost to the Lessor, or (ii) at a more convenient point closer to shore or on shore, in which event the Lessee shall be entitled to reimbursement for the reasonable cost

of transporting the royalty substance to such delivery point. The Lessee shall not be required to provide storage for royalty paid in amount in excess of tankage required when royalty is paid in value. When royalties are paid in amount, the Lessee shall not be held liable for the loss or destruction of royalty oil or other liquid products in storage from causes over which the Lessee has no control.

Sec. 7. Payments. The Lessee shall make all payments to the Lessor by check, bank draft, or money order unless otherwise provided by regulations or by direction of the Lessor. Rentals, royalties, and any other payments required by this lease shall be made payable to the United States Geological Survey and tendered to the Director, except that filing charges, bonuses, first year's rental, and other payments due upon lease issuance, shall be made payable to the Bureau of Land Management and remitted to the Manager of the appropriate field office of that Bureau.

Sec. 8. Bonds. The Lessee shall maintain at all times the bond(s) required by regulation prior to the issuance of the lease and shall furnish such additional security as may be required by the Lessor if, after operations have begun, the Lessor deems such additional security to be necessary.

Sec. 9. Plans. The Lessee shall conduct all operations on the leased area in accordance with approved exploration plans, and approved development and production plans as are required by regulations. The Lessee may depart from an approved plan only as provided by applicable regulations.

Sec. 10. Performance. The Lessee shall comply with all regulations and orders relating to exploration, development, and production. After due notice in writing, the Lessee shall drill such wells and produce at such rates as

the Lessor may require in order that the leased area or any part thereof may be properly and timely developed and produced in accordance with sound operating principles.

Sec. 11. Directional Drilling. A directional well drilled under the leased area from a surface location on nearby land not covered by this lease shall be deemed to have the same effect for all purposes of the lease as a well drilled from a surface location of the leased area. In these circumstances, drilling shall be considered to have been commenced on the leased area when drilling is commenced on the nearby land for the purpose of directionally drilling under the leased area, and production of oil or gas from the leased area through any directional well surfaced on nearby land or drilling or reworking of any such directional well shall be considered production or drilling or reworking operations on the leased area for all purposes of this lease. Nothing contained in this Section shall be construed as granting to the Lessee any interest, license, easement, or other right in any nearby land.

Sec. 12. Safety Requirements. The Lessee shall (a) maintain all places of employment within the leased areas in compliance with occupational safety and health standards and, in addition, free from recognized hazards to employees of the Lessee or of any contractor or subcontractor operating within the leased area;

(b) maintain all operations within the leased area in compliance with regulations intended to protect persons, property, and the environment on the Outer Continental Shelf; and

(c) allow prompt access, at the site of any operation subject to safety regulations, to any authorized Federal inspector and shall provide any documents and records

which are pertinent to occupational or public health, safety, or environmental protection as may be requested.

Sec. 13. Suspension and Cancellation. (a) The Lessor may suspend or cancel the lease during the initial lease term or thereafter pursuant to Section 5 of the Act and compensation shall be paid where provided by the Act.

(b) The Lessor may, upon recommendation of the Secretary of Defense, during a state of war or national emergency declared by Congress or the President of the United States, suspend operations under the lease, as provided in Section 12(c) of the Act, and just compensation shall be paid to the Lessee for such suspension.

Sec. 14. Indemnification. The Lessee shall indemnify the Lessor for, and hold it harmless from, any claim, including claims for loss or damage to property or injury to persons caused by or resulting from any operation on the leased area conducted by or on behalf of the Lessee. However, the Lessee shall not be held responsible to the Lessor under this section for any loss, damage, or injury caused by or resulting from:

(a) negligence of the Lessor other than the commission or omission of a discretionary function or duty on the part of a Federal agency whether or not the discretion involved is abused; or

(b) the Lessee's compliance with an order or directive of the Lessor against which an administrative appeal by the Lessee is filed before the cause of action for the claim arises and is pursued diligently thereafter.

Sec. 15. Disposition of Production. (a) As provided in Section 27(a)(2) of the Act, the Lessor shall have the right to purchase not more than 16⅔ percent by volume of the oil and gas produced pursuant to the lease at the regulated price, or if no regulated price applies, at the fair market value at the well head of the oil and gas

saved, removed, or sold, except that any oil or gas obtained by the Lessor as royalty or net profit share shall be credited against the amount that may be purchased under this subsection.

(b) As provided in Section 27(d) of the Act, the Lessee shall take any Federal oil or gas for which no acceptable bids are received, as determined by the Lessor, and which is not transferred to a Federal agency pursuant to Section 27(a)(3) of the Act, and shall pay to the Lessor a cash amount equal to the regulated price, or if no regulated price applies, the fair market value of the oil or gas so obtained.

(c) As provided in Section 8(b)(7) of the Act, the Lessee shall offer 20 percent of the crude oil, condensate, and natural gas liquids produced on the lease, at the market value and point of delivery as provided by regulations applicable to Federal royalty oil, to small or independent refiners as defined in the Emergency Petroleum Allocation Act of 1973.

(d) In time of war, or when the President of the United States shall so prescribe, the Lessor shall have the right of first refusal to purchase at the market price all or any portion of the oil or gas produced from the leased area, as provided in Section 12(b) of the Act.

Sec. 16. Unitization, Pooling, and Drilling Agreements. Within such areas as the Lessor may prescribe, the Lessee shall subscribe to and operate under a unit, pooling, or drilling agreement embracing all or part of the lands subject to this lease as the Lessor may determine to be appropriate or necessary, where any provision of a unit, pooling, or drilling agreement, approved by the Lessor, is inconsistent with a provision of this lease, the provision of the agreement shall govern.

Sec. 17. Equal Opportunity Clause. During the performance of this lease, the Lessee shall fully comply with paragraphs (1) through (7) of Section 202 of Executive Order 11246, as amended (reprinted in 41 CFR 60-1.14 (a)), and the implementing regulations, which are for the purpose of preventing employment discrimination against persons on the basis of race, color, religion, sex, or national origin. Paragraphs (1) through (7) of Section 202 of Executive Order 11246, as amended, are incorporated in this lease by references.

Sec. 18. Certification of Nonsegregated Facilities. By entering into this lease, the Lessee certifies, as specified in 41 CFR 60-1.8, that it does not and will not maintain or provide for its employees any segregated facilities at any of its establishments, and that it does not and will not permit its employees to perform their services at any location under its control where segregated facilities are maintained. As used in this certification, the term "segregated facilities" means, but is not limited to, any waiting rooms, work areas, rest rooms and wash rooms, restauarnts and other eating areas, areas, time clocks, locker rooms and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing facilities provided for employees which are segregated by explicit directive or are in fact segregated on the basis of race, color, religion, or national origin, because of habit, local custom, or otherwise. The Lessee further agrees that it will obtain identical certifications from proposed contractors and subcontractors prior to award of contracts or subcontracts unless they are exempt under 41 CFR 60-1.5.

Sec. 19. Reservation to Lessor. All rights in the leased area not expressly granted to the Lessee by the act, the regulations, or *this* lease are hereby reserved to the Lessor.

Without *limiting* the generality of the foregoing, reserved rights include:

(a) the right to authorize geological and geophysical exploration in the leased area which does not unreasonably interfere with or endanger actual operations under the lease, and the right to grant such easements or rights-of-way upon, through, or in the leased area as may be necessary or appropriate to the working of other lands or to the treatment and shipment of products thereof by or under authority of the Lessor;

(b) the right to grant leases for any minerals other than oil and gas within the leased area, except that operations under such leases shall not unreasonably interfere with or endanger operations under this lease;

(c) the right, as provided in Section 12(d) of the Act, to restrict operations in the leased area or any part thereof which may be designated by the Secretary of Defense, with approval of the President, as being with an area needed for national defense, and so long as such designation remains in effect no operations may be conducted on the surface of the leased area or the part thereof included within the designation except with the concurrence of the Secretary of Defense. If operations or production under this lease *within*, any designated areas are suspended pursuant to this paragraph, any ———— of rentals and royalty prescribed by this lease likewise shall be suspended during such period of suspension of operations and production, and the term of this lease shall be extended by adding thereto any such suspension period, and the Lessor shall be liable to the Lessee for such compensation as is required to be paid under the Constitution of the United States.

Sec. 20. Transfer of Lease. The Lessee shall file for approval with the appropriate field office of the Bureau of

Land Management any instrument of assignment or other transfer of this lease, or any interest therein, in accordance with applicable regulations.

Sec. 21. Surrender of Lease. The Lessee may surrender this entire lease or any officially designated subdivision of the leased area by filing with the appropriate field office of the Bureau of Land Management, a written relinquishment, in triplicate, which shall be effective as the date of filing. No surrender of this lease or of any portion of the leased area shall relieve the Lessee or its surety of the obligation to pay all accrued rentals, royalties, and other financial obligations or to abandon all wells on the area to be surrendered in a manner satisfactory to the Director.

Sec. 22. Removal of Property on Termination of Lease. Within a period of one year after termination of this lease in whole or in part, the Lessee shall remove all devices, works, and structures from the premises no longer subject to the lease in accordance with applicable regulations and orders of the Director. However, the Lessee may, with the approval of the Director, continue to maintain devices, works, and structures on the leased area for drilling or producing on other leases.

Sec. 23. Remedies In Case of Default. (a) Whenever the Lessee fails to comply with any of the provisions of the Act, the regulations issued pursuant to the Act, or the terms of this lease, the lease shall be subject to cancellation in accordance with the provisions of Section 5(c) and (d) of the Act and the Lessor may exercise any other remedies which the Lessor may have, including the penalty provisions of Section 24 of the Act. Furthermore, pursuant to Section 8(e) of the Act, the Lessor may cancel the lease if it is obtained by fraud or misrepresentation.

(b) Nonenforcement by the Lessor of a remedy for any particular violation of the provision of the Act, the

regulations issued pursuant to the Act, or the terms of this lease shall not prevent the cancellation of this lease or the exercise of any other remedies under paragraph (a) of this section for any other violation or for the same violation occurring at any other time.

Sec. 24. Unlawful Interest. No member of, or Delegate to, Congress, or Resident Commissioner, after election or appointment, or either before or after they have qualified, and during this continuance in office, and no officer, agent, or employee of the Department of the Inerior, except as provided in 43 CFR Part 7, shall be admitted to any share or part in this lease or derive any benefit that may arise therefrom. The provisions of Section 3741 of the Revised Statutes, as amended, 41 U.S.C. 22, and the Act of June 25, 1948, 62 Stat. 702, as amended, 18 U.S.C. 431-433, relating to contracts made or entered late, or accepted by or on behalf of the United States, from a part of this lease insofar as they may be applicable.

MOBIL OIL CORPORATION, Lessee	THE UNITED STATES OF AMERICA, Lessor
By: /s/ S.T. Alexander S.T. ALEXANDER Assistant Secretary	/s/ John L. Rankin JOHN L. RANKIN Manager New Orleans Outer Continental Shelf Office Bureau of Land Management
August 17, 1981	August 31, 1981

Nine Greenway Plaza, Suite 2700
Houston, Texas 77046

[Seal Omitted]

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

Stipulation for Oil and Gas Lease Sale No. 56
Outer Continental Shelf
South Atlantic

STIPULATION No. 1

OCS-A 0220

If the DCM has reason to believe that a site, structure or object of historical or archaeological significance (hereinafter referred to as "cultural resource"), may exist in the lease area and gives the lessee written notice that the lessor is invoking the provisions of this stipulation, the lessee shall upon receipt of such notice comply with the following requirements.

Prior to any drilling activity or the construction or placement of any structure for exploration or development on the lease, including, but not limited to, well drilling and pipeline and platform placement (hereinafter in this stipulation referred to as "operation") the lessee shall conduct remote sensing surveys to determine the potential existence of any cultural resource that may be affected by such operations. All data produced by such remote sensing surveys as well as other pertinent natural and cultural environmental data shall be examined by a qualified marine survey archaeologist to determine if indications are present suggesting the existence of a cultural resource that may be adversely affected by any lease operation. A report of this survey and assessment prepared by the marine survey archaeologist shall be submitted by the Lessee to the DCM and to the Manager for review.

If such cultural resource indicators are present the lessee shall: (1) locate the site of such operation so as not to

affect adversely the identifed location; or (2) establish, to the satisfaction of the DCM, on the basis of further archaeological investigation conducted by qualified marine survey archaeologist or underwater archaeologist using such survey equipment and techniques as deemed necessary by the DCM either that such operation will not adversely affect the location identified or that the potential cultural resource suggested by the occurrence of the indicators does not exist.

A report of this investigation prepared by the marine survey archaeologist or underwater archaeologist shall be submitted to the DCM and the Manager for review. Should the DCM determine that the existence of a cultural resource which may be adversely affected by such operation is sufficiently established to warrant protection, the lessee shall take no action that may result in an adverse effect on such cultural resource until the DCM has given directions as to its preservation.

The lessee agrees that if any site, structure or object of historical or archaelogical significance should be discovered during the conduct of any operations on the leased area, he shall report immediately such findings to the DCM and make every reasonable effort to preserve and protect the cultural resource from damage until the DCM have given directions as to its preservation.

STIPULATION No. 2

Prior to any drilling activity or the construction or placement of any structure for exploration or development on a lease, including but not limited to well drilling and pipeline and platform placement, the lessee will submit to the DCM as part of his exploration and/or development plan a bathymetry map, prepared utilizing remote sensing and/or other survey techniques. This map will include

interpretations for the presence of live bottom areas within a minimum of 1,820 m radius of the proposed exploration or production activity site.

For the purpose of this stipulation, live bottom areas are defined as those areas which contain biological assemblages consisting of such [Illegible] invertebrates as sea fans, sea whips, hydroids, anemones, aecidians, sponges, bryozoans, or corals living upon and attached to naturally occurring hard or rocky formations with rough, broken or smooth topography; or whose lithotope favors the accumulation of turtles, fishes, and other fauna.

If it is determined that the remote sensing data indicate the presence of hard or live bottom areas, the lessee will also submit to the DCM photo-documentation of the sea bottom near proposed exploratory drilling sites or proposed platform locations.

If it is determined that live bottom areas might be adversely impacted by the proposed activities, then the DCM will require the lessee to undertake any measure deemed economically, environmentally, and technically feasible to protect live bottom areas. The measures may include, but are not limited to, the following:

(a) The relocation of operations to avoid live bottom areas

(b) The shunting of all drilling fluids and cuttings in such a manner as to avoid live bottom areas;

(c) The transporation of drilling fluids and cuttings to approved disposal sites; and

(d) The monitoring of live bottom areas to assess the adequacy of any mitigation measures taken and the impact of lessee initiated activities.

STIPULATION No. 3

Whether or not compensation for such damage or injury might be due under a theory of strict or absolute liability or otherwise, the lessee assumes all risk of damage or injury to persons or property, which occur in, on, or above the Outer Continental Shelf, to any persons or to any property of any person or persons who are agents, employees or invitees of the lessee, its agents, independent contractors, or subcontractors doing business with the lessee in connection with any activities being performed by the lessee in, on, or above the Outer Continental Shelf if such injury or damage to such person or property occurs by reason of the activities of any agency of the U.S. Government, its contractors or subcontractors, or any of their officers, agents or employees, being conducted as a part of, or in connection with the programs and activities of the Fleet Area Control & Surveillance Facility, Virginia Beach, VA.

Notwithstanding any limitation of the lessee's liability in Sec. 14 of the lease form, the lessee assumes this risk whether such injury or damage is caused in whole or in part by any act or omission, regardless of negligence or fault, of the United States, its contractors or subcontractors, or any of their officers, agents, or employees. The lessee further agrees to indemnify and save harmless the United States against all claims for loss, damage, or injury sustained by the agents, employees, or invitees of the lessee, its agents, or any independent contractors or subcontractors doing business with the lessee in connection with programs and activities of the aforementioned military installation whether the same be caused in whole or in part by the negligence or fault of the United States, its contractors, subcontractors, or any of their officers, agents, or employees and whether such claims might be sustained under a theory of strict or absolute liability or otherwise.

The lessee agrees to control his own electromagnetic emissions and those of his agents, employees, invitees, independent contractors or subcontractors emanating from individual designated defense warning areas in accordance with requirements specified by the Commander, Fleet Area Control & Surveillance Facility, Virgina Beach, VA. to the degree necessary to prevent damage to or unacceptable interference with Department of Defense flight, testing or operational activities, conducted within designated warning areas.

Necessary monitoring control, and coordination with the lessee, its agents, employees, invitees, independent contractors or subcontractors will be effected by the commander of the appropriate onshore military installation conducting operations in the particular warning area, provided, however, that control of such electromagnetic emissions shall in no instance prohibit all manner of electromagnetic communication during any period of time between a lessee, its agents, employees, invitees, independent contractors, or subsontractors and onshore facilities.

The lessee when operating or causing to be operated on its behalf boat or aircraft traffic into the individual designated warning area shall enter into an agreement with the Commander, Fleet Area Control & Surveillance Facility, Virgina Beach, VA. on utilizing an individual designated warning area prior to commencing such traffic. Such agreement will provide for positive control of boats and aircraft operating in the warning areas at all times.

STIPULATION No. 7

Portions of this lease may be subject to mass movement of sediments related to unstable slopes with associated shallow faulting. Exploratory drilling operations, emplacement of structures (platforms) or seafloor wellheads

for production or storage of oil or gas, and the emplacement of pipelines will not be allowed within the potentially unstable portions of this lease block until the lessee has demonstrated to the DCM's satisfaction that mass movement of sediments is unlikely or that exploratory drilling operations, structure (platform), casing, wellhead and pipelines can be safely designed to protect the environment in case such mass movement occurs at the proposed location. This may necessitate that all exploration for and development of oil or gas be performed from locations outside of the area of unstable sediments either within or outside of this lease block.

If exploratory drilling operations are allowed, site-specific surveys shall be conducted to determine the potential for unstable bottom conditions. If emplacement of structures (platforms) or seafloor wellheads for production or storage of oil or gas is allowed, all such unstable areas must be mapped. The DCM may also require soil testing before exploration and production operations are allowed.

STIPULATION No. 9

Pipelines will be required: (1) if pipeline rights-of-way can be determined and obtained; (2) if laying such pipelines is technically feasible and environmentally preferable; and (3) if, in the opinion of the lessor, pipelines can be laid without net social loss, taking into account any incremental costs of piplines over alternative methods of transportation and any incremental benefits in the form of increased environmental protection or reduced multiple use conflicts. The lessor specifically reserves the right to require that any pipelines used for transporting production to shore be placed in certain designated management areas. The lessor's decision regarding the selected means of transportation will be made within the context

of an intergovernmental planning process for assessment and management of transportation of Outer Continental Shelf oil and gas with participation of federal, state, and local government and the industry. Where feasible, all pipelines, including both flow lines and gathering lines for oil and gas, shall be buried to a depth suitable for adequate protection from water currents, and waves, storm scouring, fisheries trawling gear, and other uses as determined on a case-by-case basis.

Following the completion of pipeline installation, no crude oil production will be transported by surface vessel from offshore production sites, except in the case of emergency. Determinations as to emergency conditions and appropriate responses to these conditions will be made by the DCM. Where the three criteria set forth in the first sentence of this stipulation are not met and surface transportation must be employed, all vessels used for carrying hydrocarbons to shore from the leased area will conform with all standards established for such vessels, pursuant to the Ports and Waterways Safety Act of 1972 (46 U.S.C. 391a).

APPENDIX I

[DOI Logo]

UNITED STATES
DEPARTMENT OF THE INTERIOR

MINERALS MANAGEMENT SERVICE
Atlantic OCS Region
381 Elden Street, Suite 1109
Herndon, Virginia 22070-4817

Sep. 28 1990

Honorable James G. Martin
Governor of North Carolina
Raleigh, North Carolina 27603-8001

Dear Governor Martin:

Mobil Oil Corporation, acting as lessee and operator for Block 467 of the Manteo Area offshore North Carolina, submitted an Exploration Plan (hereafter Plan) on August 20, 1990. Block 467 is part of a 21-block unit approved on May 25, 1990. Mobil is also the designated operator for this unit. The Plan calls for the drilling of one exploratory well. Should results of this well prove promising, Mobil will need to submit a new Exploration Plan before drilling any of the six proposed delineation wells mentioned in their Plan.

The Plan was deemed complete on August 30, and transmitted to other Federal Agencies and the State of North Carolina on that date. Timely comments were received from the State of North Carolina and the U.S. Coast Guard. An analysis of the potential environmental affects associated with the Plan was conducted, an Environmental Assessment (EA) was prepared, and a Finding of No Significant Impact (FONSI) was made. Analyses of the geological and geophysical aspects of the proposal were made on the draft Plan in October 1989.

The Plan submitted by Mobil complied in all respects with Minerals Management Service (MMS) regulations contained in 30 CFR 250.33 governing Exploration Plans. The Oil Spill Contingency Plan (OSCP) also complied with MMS regulations and was deemed adequate by the U.S. Coast Guard.

The Plan, together with its supporting information, is deemed to be approvable in all respects. The Outer Banks Protection Act (OBPA) of 1990, however, prohibits the approval of any Exploration Plan at this time. Under Section 11(c) of the Outer Continental Shelf Lands Act, we are required to approve an Exploration Plan unless it is inconsistent with applicable law or because it would result in serious harm to the environment. Because we have found that Mobil's Plan fully complies with the law and will have only negligible effect on the environment, we are not authorized to disapprove the Plan or require its modification as you suggest.

However, because we are currently prohibited from approving it, the Plan will remain on file until the requirements of the OBPA are met. Our determinations concerning this Plan will be re-evaluated at that time. I am advised that our Solicitor's office has spoken with the North Carolina Attorney General's office on this point, and they agree with this interpretation of the two statutes.

A suspension has been granted to all leases offshore the State of North Carolina (as defined in the OBPA) which will remain in effect until the statutory prohibitions to operations contained in the OBPA are no longer in force.

Sincerely,

/s/ Bruce G. Weetman
BRUCE G. WEETMAN
Regional Director

bcc: Ed Cassidy
William C. Whitemore, Mobil
AOCS File
AOCS Chron
Offshore Chron (1)/(2)

LMS:AOCS:Mail Stop 6000:BGWeetman:jhs:09/28/90

APPENDIX J

[Logo]

Washington

April 2, 1992

Honorable Thomas S. Foley
Speaker of the House
of Representatives
Washington, DC 20515

Dear Mr. Speaker:

As required by section 6003 of the Oil Pollution Act of 1990, enclosed is my report on the findings and recommendations of the North Carolina Environmental Sciences Review Panel (ESRP). A copy of the full ESRP report is also enclosed for your consideration.

I met with Dr. John Costlow, the panel chairman, to accept the report and discuss its conclusions and recommendations. I commend Dr. Costlow and each panel member for their outstanding work. The panel was asked to come up to speed quickly on complex issues and other information that in some instances were unfamiliar to them. They accepted the challenge, and I believe their work will further our efforts to develop the future energy resources of our Nation in an environmentally sound manner.

I would be pleased to have my staff provide any further details you may require concerning our response to the panel's conclusions and recommendations.

Sincerely,

/s/ [Illegible]

2 Enclosures

Identical Letter Sent To:

Honorable Dan Quayle
President of the Senate

bcc: Sec. Surname
MMS Gen. File
Sec. Reading (2)
ES (2)
AS/LM (2)
OCL
Dir. Chron
MMS/OCLA
AD/OMM
ES&LS File
ES&LS Chron
AOCS Chron
Offshore Chron 1/2

LMS:AOCS:MS6300:TSullivan:mc:02/03/92:03/03/92:(703) 787-1074 disk:sullivanwp5.1:fname:esrp-sec.rpt

Enclosure 1

REPORT TO CONGRESS ON THE FINDINGS OF THE NORTH CAROLINA ENVIRONMENTAL SCIENCES REVIEW PANEL

Section 6003 of the 1990 Oil Pollution Act entitled, Outer Banks Protection Act (OBPA), mandated the establishment of a five member Environmental Sciences Review Panel (ESRP). The ESRP was directed by the OBPA to "assess the adequacy of the available physical oceanographic, ecological, and socioeconomic information" for offshore North Carolina enabling the Secretary of the Interior to carry out his responsibilities under the OCS Lands Act with respect to decisions about energy development off the Outer Banks. If the Panel determined that some information was inadequate, it was required to specify the additional data needed.

The OBPA further mandated that the ESRP membership consist of "(A) 1 marine scientist selected by the Secretary of the Interior; (B) 1 marine scientist selected by the Governor of North Carolina; and (C) 1 person each from the disciplines of physical oceanography, ecology, and social science to be selected jointly by the Secretary of the Interior and the Governor of North Carolina from a list of individuals nominated by the National Academy of Sciences." I selected Dr. John Teal of the Woods Hole Oceanographic Institution as the Department of the Interior's representative and Governor Martin selected Dr. John Costlow of the Duke University Marine Laboratory. The Department of the Interior and the State of North Carolina mutually selected Dr. Charles Peterson of the University of North Carolina, Chapel Hill, a marine ecologist; Dr. Kenneth Brink of Woods Hole Oceanographic Institution, a physical oceanographer; and Dr. Michael Orbach of East Carolina University, a social

scientist. Dr. Costlow was elected Chairman of the ESRP at the first meeting.

The Panel, formed under the Federal Advisory Committee Act, held the first of its seven meetings on January 28, and the last on November 25, 1991. Six of the seven meetings were held in North Carolina and one in Woods Hole, Massachusetts. All were open to the public. The Panel submitted its final report to me on Janaury 23, 1992. The report identified additional data needs related to the physical oceanographic, ecological, and socioeconomic information base. In the opinion of the ESRP, these data are needed to reach informed decisions about drilling a single exploratory well, any subsequent delineation wells, and any proposed development and production. In addition, the Panel specified data needs for future leasing offshore North Carolina.

Among the Panel's conclusions were that the probability of any significant environmental effects from a single well is extremely low. A set of limited duration socioeconomic studies and an expanded survey of the bottom-dwelling organisms in the vicinity of the Manteo drillsite were recommended prior to drilling the first exploratory well. More specifically, the information the ESRP recommended gathering prior to drilling the first well at the Manteo 467 site includes:

1. A set of socioeconomic studies to address the following topics: base case characterization analysis; community studies; aesthetic and perceptual issue analysis; infrastructure issue analysis; and a socioeconomic monitoring study. Due to the limited potential for impact and the small scale of drilling the first exploratory well, these socioeconomic studies are limited in scope, and with the exception of the monitoring study, are expected to be complete in about

one year. The objectives and exact methodology to be used in each socioeconomic study are not clearly defined in the ESRP report. However, Dr. Orbach, East Carolina State University, the social scientist on the ESRP, who recommended the study, has agreed to assist the DOI in better defining the study requirements. The socioeconomic subgroup of the Department's OCS Scientific Committee has also agreed to provide advice. We have already set aside funds to initiate these studies in 1992, and are beginning the procurement phase.

2. The conduct of a limited bottom survey of the Manteo 467 site was recommended. The purpose would be to determine the geographic extent of the biological communities in the vicinity of the proposed drill site. If more than 5% of the surface area of these biological communities could be covered by drilling related discharges, a follow up study of recovery time for the affected community is recommended. As a part of the planning for this study, data from the recently completed series of submersible cruises supported by the National Underwater Research Center at the University of North Carolina at Wilmington (UNCW) will be reviewed, if made available by UNCW. A determination will then be made as to what additional data may be required to accomplish the objectives of the recommended study.

The Panel also recommended that several ecological, physical oceanographic, and socioeconomic studies, some involving field work, should be started "immediately", but need not be completed until after the first well was drilled. The ESRP concluded that more information was needed to support future leasing decisions offshore North Carolina and developed a table of recommended studies

in their report which were phased with the different stages of OCS development from pre-leasing to post production.

The ESRP used criteria developed by the National Academy of Sciences for judging the adequacy of information relevant to oil and gas development on the OCS. I believe the Panel's definition of adequacy, while defensible from a strictly scientific point of view, was far more restrictive and narrow than my charge under the Outer Continental Lands Act (OCSLA) and the more management oriented approach implied in the OBPA. The OCSLA requires that the timing and location of exploration, development, and production be based on a consideration of existing information concerning the geographical, geological, and ecological characteristics of a region. Also, OCSLA requires that I strike a balance between the potential for environmental damage, the potential for the discovery for oil and gas, and the potential for adverse impact on the coastal zone. While there is much more we would like to know, the question for me is what information is necessary for each phase of the decision process and to balance that consideration against the potential of a region for the discovery of oil and gas. In this regard, I believe that, in spite of scientific data gaps identified by the ESRP, the information that currently exists is adequate to allow me to make a reasoned decision about the activities presently proposed to take place offshore North Carolina. However, following a thorough consideration of the Panel's numerous, thoughtful recommendations, I have decided to fund and conduct the socioeconomic studies prior to drilling the first exploratory well. The geographical extent of the biological communities in the vicinity of the well site will also be determined prior to approving any drilling activities.

The objectives of any future ESRP recommended studies will be reviewed at each phase of development. However,

the studies will not begin in earnest prior to reviewing the initial exploration drilling. Specifically, the objectives of these studies will be evaluated after the results are available from the first exploratory well. This is consistent with the National Environmental Policy Act (NEPA) concept of a phased approach to information gathering as the issues become ripe for OCS development decisions. The ESRP also concluded that the first exploratory well should not be held up by these studies. Of paramount importance to the design of any of these studies are the results from the first exploratory well; an assessment of the study objectives in light of existing conditions; the review of other relevant, ongoing studies of fisheries and the *Sargassum* community being supported by the National Marine Fisheries Service Labortory in Beaufort, North Carolina; and the availability of adequate additional funds from Congress to support them. In addition, a commitment has already been made to do a full EIS on any Manteo Prospect development and production plan. The need for studies could be a part of that environmental assessment process.

In conclusion, after careful review of the ESRP report, I remain convinced that sufficient information presently exists to allow me to exercise my responsibilities under the OCSLA and the NEPA and consider approval of the exploration activities currently proposed to take place offshore North Carolina (i.e., the first Manteo exploratory well) and, in compliance with Section (c)(3)(A)(ii)(I) of the OBPA, I hereby so certify. However, since the ESRP requests for these limited socioeconomic and biological studies are reasonable from a scientific perspective and will undoubtedly add to our information base, I will not issue a permit, approve the exploration plan, or allow any drilling until the studies have been completed.

In addition, I fully intend to address the issues raised by the ESRP regarding prohibited activities which include conducting a lease sale and issuing any new leases. The draft proposed comprehensive program provides for a new approach to the consideration of oil and gas leasing on the OCS. This approach incorporates the use of a new Area Evaluation and Decision Process (AEDP) for the consideration of leasing, heightening attention to the adequacy of information, and the resolution of conflicts. This process includes an information acquisition and evaluation phase which focuses on the acquisition of environmental, oil and gas resource, economic, and industry interest information to be used in the subsequent oil and gas management planning and decision-making efforts in a planning area. Existing information from all sources (including MMS's environmental studies program and geologic studies and resource evaluation studies) will be evaluated, needs for additional or better information will be identified, studies priorities will be established, and studies plans will be developed. Consultation and cooperation with a wide range of interested parties are integral parts of this process.

In 1977 a major effort was initiated to restructure the environmental studies planning process such that the information needs of the OCS minerals management decisionmaking process would drive the Environmental Studies Program (ESP). The National Research Council (NRC) was contracted to study the existing program and to recommend changes. Subsequent to the NRC review, a program management document entitled "Study Design for Resource Management Decisions: OCS Oil and Gas Development and the Environment" was issued. This document restructured the ESP and required a clear relation between a study and OCS issues and decisions (BLM,

1978). This approach continues to be in effect today. The AEDP enhances this approach by facilitating the integration of studies information into the decision process and improving the responsiveness of the information acquisition process to planning, consultation, and analysis efforts undertaken for specific leasing proposals.